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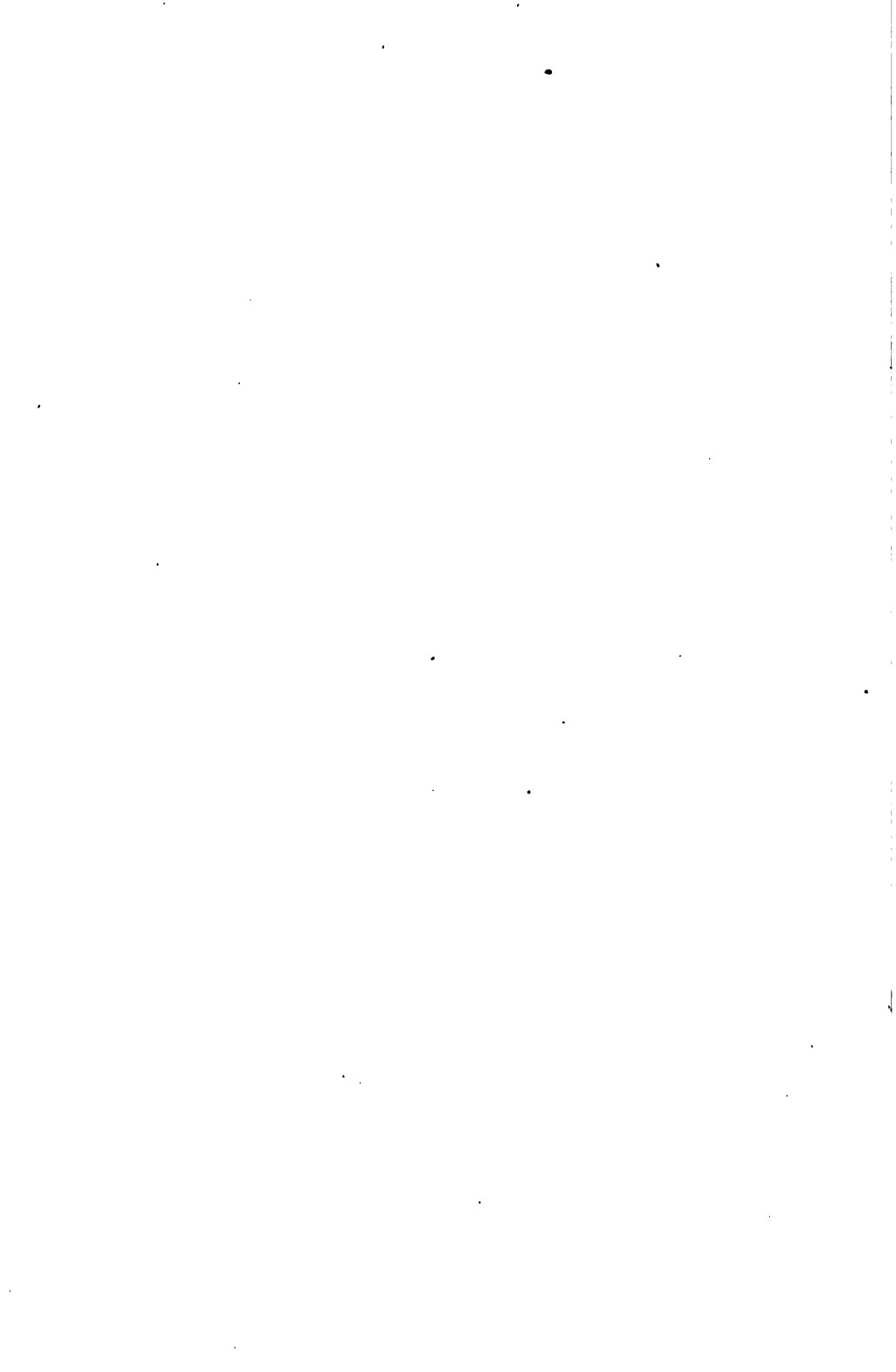
The Ontario Weekly Reporter

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The Ontario Weekly Reporter

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THE
ONTARIO WEEKLY REPORTER

AND

INDEX-DIGEST

JULY-DECEMBER, 1904

EDITOR :
E. B. BROWN, ESQUIRE
BARRISTER, ETC.

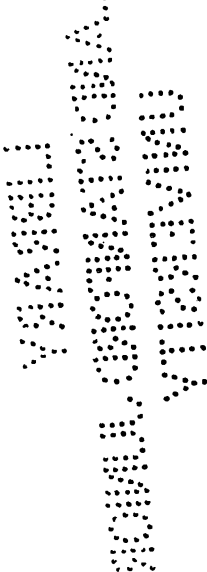
VOLUME IV.

TORONTO :
THE CARSWELL COMPANY, LIMITED

1904

Entered according to the Act of the Parliament of Canada, in the year one
thousand nine hundred and five, by THE CARSWELL COMPANY, Limited,
in the office of the Minister of Agriculture.

93528



PRINTED BY
THE CARSWELL COMPANY, LIMITED
30 ADELAIDE STREET EAST,
TORONTO

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- Way: O'Connor v. City of Hamilton, 3 O. W. R. 918, 8 O. L. R. 391.
- Will: Re Mumby, 3 O. W. R. 146, 8 O. L. R. 283.
- Will: Mutchmor v. Mutchmor, 3 O. W. R. 309, 931, 8 O. L. R. 271.
- Will: Re Smith, 3 O. W. R. 380, 7 O. L. R. 619.
- Will: Re Fleming, 3 O. W. R. 622, 7 O. L. R. 651.
- Will: Martin v. Martin, 3 O. W. R. 930, 8 O. L. R. 462.

if they are cut and if I am notified," etc. . . . Then follows an allegation that plaintiff, pursuant to the terms of "said agreement," hauled out "the said 800 cords," and the claim is for payment of \$500. . . .

The evidence given at the trial was very meagre, and nothing was shewn as to the circumstances under which the two documents indorsed on the Gallagher agreement were executed. . . .

Defendant's position, as presented before us in argument, does not depend upon novation having taken place. It is this, that the result of the transactions between him and plaintiff is that the latter became the assignee of his rights under the Gallagher contract, and that the second memorandum was intended to limit, and has the effect of limiting, the obligation which, without it, would have rested on plaintiff . . . to perform the contract in all its terms so far as they were to be performed by defendant; and to give to plaintiff the right to perform the contract according to its terms, but obliging him to perform it only in the modified manner mentioned in the second memorandum, and as between defendant and plaintiff without any personal liability on defendant's part to pay for the work to be done, leaving plaintiff to look to Gallagher, and to him alone, for payment. The other view . . . is that the second memorandum is in the nature of a sub-contract between plaintiff and defendant, that plaintiff should do for defendant the work which defendant had contracted to do for Gallagher, subject . . . to the variation . . . between the agreement and the second memorandum. . . .

Much may be said in favour of either view, and it is here that I feel embarrassment owing to the absence of any clear statement in the pleading as to the nature of the contract which plaintiff alleges was formed by the writings . . . and of any light being thrown by the evidence on the circumstances under which the transaction . . . was entered into.

The inclination of my mind is against plaintiff's contention, though I have formed no definite opinion either way, and it appears to me that . . . the best course to take will be to direct a new trial. . . .

The parties should have leave to amend as they may be advised. It may be that if, having regard to the terms of the second memorandum, plaintiff was not in default as to the 400 cords, but Gallagher is rightly withholding payment of the \$500 in respect of the 800 cords because of a claim for damages against defendant for breach of his agreement as to the 400 cords (for defendant may be liable to Gallagher,

although plaintiff is not liable to defendant), plaintiff may have a cause of action against defendant for the loss he has sustained by Gallagher withholding the \$500. . . .

Costs of the last trial and of the appeal in the cause unless the trial Judge otherwise orders.

JULY 2ND, 1904.

DIVISIONAL COURT.

RE ARTHUR AND MINTO UNION SCHOOL SECTION 17.

Public Schools—Formation of Union School Section—Award—Appointment of Arbitrators—Amendment of Public Schools Act—Effect on Pending Appeal—Stay of Proceedings.

Appeal by the trustees of school sections Nos. 12 and 13 of Minto from order of MEREDITH, C.J., 2 O. W. R. 930, referring back the award of the arbitrators appointed under sec. 46 of the Public Schools Act, 1901, but confirming the proceedings in so far as regards the formation of union school No. 17 Arthur and Minto.

W. Kingston, K.C., for appellants.

A. Spotten, Harriston, for petitioners.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—After the argument an Act was passed by the Ontario Legislature amending sec. 45 of the Public Schools Act by altering “1901” therein to “1904,” and declaring that an award by a majority of the arbitrators appointed under sec. 46 should be good. . . .

In my opinion, school section No. 17 of Arthur and Minto had been formed and existed in fact before 1st April, 1904, and any defects in its formation were cured by the amendment made. . . . An award had been made by de facto arbitrators; they had been declared by the judgment appealed from to have been duly appointed; their award had been confirmed upon all points but one, and, being referred back to them on that point, had been made good by a supplementary award; and all this had taken place before the passing of the amending Act. The Act is expressly made applicable to pending proceedings, so that the fact that an appeal was pending at the time the Act was passed does not prevent it from applying.

It was the duty of the appellants upon the passing of the Act to apply for a stay of proceedings; further arguments, however, have been adduced to us upon the effect of the Act.

In my opinion, the proceedings should now be stayed, each party paying their own costs of the appeal.

JULY 2ND, 1904.

DIVISIONAL COURT.

MORIARITY v. HARRIS.

Assault—Police Constable—Acting Virtute Officii—Malice—Reasonable and Probable Cause—Orders of Superior—Excess of Violence—R. S. O. ch. 88.

Motion by defendant to set aside the judgment of MEREDITH, C.J., upon the findings of the jury, in favour of plaintiff for \$300 and costs, and for judgment for defendant upon the findings, or for a new trial.

The statement of claim alleged that defendant was a police constable of the city of Hamilton, and that he maliciously and without reasonable and probable cause assaulted plaintiff. Defendant pleaded not guilty by statute, R. S. O. ch. 88, secs. 1 to 24, and that the acts complained of were done by him, if at all, in the performance of his duty as police constable and without malice.

It appeared that on 18th August, 1903, plaintiff was driving a watering cart in the streets and public places of the city of Hamilton, and came to the market square, where a crowd was assembled to see a bicycle performance. The market clerk, who had the superintendence of the square, directed defendant, who was on duty as police constable in the square, to cause plaintiff to move his water cart from a position in which it was standing, and in which he thought it was causing an obstruction and possible danger. Defendant went over to plaintiff and directed him to move on. There was a dispute as to what followed, but it appeared clearly that at the end of a few moments plaintiff fell or was pushed by defendant from his seat on the cart and was injured.

Questions were put to the jury, which with their answers were as follows:—

1. Did defendant intentionally throw or push plaintiff off his watering cart? A. No.

2. If not, was plaintiff pushed off or thrown off as the result of violence by defendant? A. Yes.

3. Or did plaintiff fall off while endeavouring to prevent defendant from getting possession of the lines? A. No.

4. Was plaintiff interfering with or preventing the market place from being used for the purpose for which it was designed? A. No.

5. Did plaintiff, after having been ordered by defendant to desist from watering, continue watering and refuse to desist? No.

6. Did defendant use more violence towards plaintiff than was reasonably necessary to prevent plaintiff from incumbering the market place and from wetting the by-standers? A. Yes.

7. Was the use of the market place for the purpose for which it was being used a reasonable one? A. No.

8. Was plaintiff interfering with or preventing the market place from being used for the purpose for which it was actually being used? A. Yes.

9. Did defendant act maliciously and without reasonable and probable cause in doing what he did? A. Not maliciously.

10. Damages? A. \$300 for the excess.

The trial Judge found upon these answers that defendant had acted without reasonable and probable cause and entered judgment for plaintiff for \$300 and costs.

The motion was heard by FALCONBRIDGE, C.J., STREET, J., IDINGTON, J.

F. MacKelcan, K.C., and G. Lynch-Staunton, K.C., for defendant.

H. Carscallen, K.C., for plaintiff.

STREET, J.—It appears clear that the constable in what he did here, whatever it was, was acting *virtute officii*, as it is expressed by Lord Kenyon in *Alcock v. Andrews*, 1 Esp. 542 n. He was on duty at the market square, and was directed by the clerk of the market, who had charge of the premises for the city, to make plaintiff move his watering cart from a position in which it appeared to be creating an obstruction and a danger. The finding of the jury is that plaintiff was in fact interfering with the use of the market place for the purpose for which it was being used. It was while engaged in the effort to make plaintiff move on his watering cart, in pursuance of the order of the market clerk, that defendant caused the injuries complained of. It does

not appear to have been disputed at the trial that defendant was in fact acting *virtute officii*; for the damages given by the jury have been assessed by them without objection on plaintiff's part, not for the whole assault, but only for the excess of force or violence used in carrying out what defendant might properly have done using only necessary force or violence.

This being the case, it was unnecessary, in my opinion, for defendant to prove that the use being made of the market square was authorized by the city council. The market clerk was the official in charge of it for the city, and the constable, receiving his order to remove a person obstructing the actual use of it, was not bound to search the city by-law for the exact limitations of the market clerk's authority before acting upon his order. It was sufficient that he believed in good faith in the authority of the market clerk, the *de facto* representative of the city, to prevent the continuance of the obstruction: *Griffith v. Taylor*, 2 C. P. D. 194; *Gosden v. Elphick*, 4 Ex. 445; *Kelly v. Barton*, 26 O. R. 608.

Defendant, having been acting in his office of constable within the meaning of the Act, is brought within the protection of sec. 1 of R. S. O. 1897 ch. 88, and it was necessary for plaintiff to allege, as he has done, and to prove, as he has failed to do, that defendant had acted maliciously and without reasonable and probable cause. The jury have found expressly that he did not act maliciously, and the action, therefore, in my opinion, fails.

I think the judgment entered for plaintiff should be set aside, and that judgment should be entered for defendant with costs of the action and of this motion.

FALCONBRIDGE, C.J., gave reasons in writing for the same conclusion, referring to *Bacon Abr.*, 7th ed., vol. 2, p. 171; *Staight v. Gee*, 2 Stark. 445; *Theobald v. Crickmore*, 1 B. & Ald. 227; *Gordon v. Elphick*, 4 Ex. 445.

IDINGTON, J., concurred, also giving reasons in writing.

BRITTON, J.

JULY 4TH, 1904.

TRIAL.

ANDREWS v. TOWNSHIP OF PAKENHAM.

Way—Highway—Establishment of—Evidence—By-law—Dedication—Statute Labour—Municipal Corporation.

Action for damages for obstructing an alleged highway and for a mandamus compelling defendants to open up this

highway or compel defendant corporation to provide access to plaintiff's land.

J. A. Allan, Perth, and J. E. Thompson, Arnprior, for plaintiff.

J. T. Kirkland, Almonte, and W. H. Stafford, Almonte, for defendant corporation.

A. M. Greig, Almonte, and J. M. Rogers, Perth, for defendant Adam Andrews.

BRITTON, J.—Plaintiff owns lot 15 and the south half of lot 16 in the 5th concession of Pakenham; and the original road allowances leading up to and giving access to this land are not now, and never have been, open to the public for travel. The physical difficulties are so great, owing to the country in the vicinity of this land being rocky and swampy, that to open the original road allowances is practically impossible.

The defendant Adam Andrews owns lots 15 and 16 in the 6th concession of the same township.

As long ago as 2nd October, 1875, the defendant corporation passed a by-law to establish a road across lots 12, 13, and 14 in the 7th concession, 14, 15, and 16 in the 6th concession, and lot 16 in the 5th concession, and the township opened and established a road, if not upon, near to, and apparently intended to be upon, the line across lots 12, 13, and 14 in the 7th concession and lot 14 in the 6th concession, but the question now is as to any public highway across 15 and 16 in the 6th concession. These lots belong to the defendant Andrews, and he has erected fences and gates at certain points on what plaintiff calls the highway.

The defendants say the by-law is bad. If the council had acted upon the by-law as to this part of what is called the highway, and if it had been travelled as such, the council and ratepayers regarding it as a highway, I would at this distance of time be very loth to pronounce the by-law bad merely because formalities required for its passing had not been complied with. The clerk says the notices required were not correctly given. There were four publications of the notice in one newspaper in the county, viz., 23rd and 30th July, and 6th and 13th August, but the notice was of a by-law to be passed on the 7th August, so there were only 3 publications of this notice before the date named. The by-law was not in fact passed until 2nd October, 1875, and there was another newspaper published in the county during that period. There is evidence that persons interested appeared before and were heard by the council—so, as to

anything actually done under this by-law, I should hold the by-law good, and, in the absence of the clearest proof to the contrary, the presumption that the necessary formalities were complied with should prevail.

The plaintiff's difficulty is that, even if by-law good, the road, as now contended for, was not in fact established.

No land above lots 14 and 15 in the 6th concession was taken by the council, nor was there compensation paid, or arbitration in reference to any land north of these lots. It has not been proved that any highway, as now claimed, was established under the by-law mentioned or otherwise. No dedication to the public of this land for a highway.

The road as now claimed is not in fact either in the line as laid down in the by-law, nor is it now as travelled and used when, or shortly after, the by-law was passed.

A very little statute labour was done on a piece still further north on defendant Andrews's land, which, it is contended, is a continuation of the road—but no statute labour has been done upon or near the place where the obstructions have been placed.

The statute labour actually permitted by the council was so insignificant in amount and performed under such circumstances as would not, in my opinion, weigh in establishing a highway.

No useful purpose will be served by my reviewing the evidence, which was given at considerable length, or by reference to the many cases cited. The case was very fully presented and very ably argued. I have come to the conclusion that a highway has not been established across defendant's land. It certainly would not be a matter of regret if I could see my way, upon the law and evidence, to give to plaintiff a road to his land, tilled and used under great disadvantage in a remote and rough part of the country. Plaintiff and defendant Adam Andrews are brothers. The land required from defendant to give to plaintiff the much needed road is of comparatively little value, and yet, because of an unfortunate bad feeling between these brothers, this expensive litigation resulted. I am of opinion that an attempt by the council to settle this difficulty would have been successful, and that it could have been settled at comparatively little expense, and that, in view of the previous action of the council, an attempt under the circumstances would have been justifiable.

Considering all the circumstances, the action should be dismissed without costs, and there should be no costs to either defendant from the other, or from plaintiff, upon the third party notice or proceeding.

BRITTON, J.

JULY 4TH, 1904.

TRIAL.

WILCOX v. JOHNSON.

Timber—Sale of—Contract—Re-sale of Tree-tops—Right of Purchaser to go on Land to Take after Time Expired—Extension of Time—Action of Trespass—Costs.

Action for trespass and for an injunction to restrain defendants from taking wood, etc., from plaintiff's land.

J. P. Mabee, K.C., and G. F. Mahon, Woodstock, for plaintiff.

G. H. Watson, K.C., and W. A. Dowler, Tilsonburg, for plaintiff.

BRITTON, J.—The land in respect to which trespass is charged is owned by Mrs. Melvina Copp, a sister of plaintiff, and plaintiff is her tenant. On 22nd July, 1901, Mrs. Copp sold for \$450 to the Tillson Co. all the timber then standing on this land. The sale was evidenced by a written instrument, which provided that the company should have until 1st April 1902, to take the timber off, and should have free ingress and egress to the lot for such purposes at all times; also that all brush from timber should be piled and any fence damaged made good. . . .

The timber was all cut in 1901 and 1902. It was agreed between Mrs. Copp and the Tillson Co. that there should be an extension of time for getting the timber off, and plaintiff assented to this. The extension was to be until one week after the ground was dry enough in the spring of 1903 to permit removal.

On 9th April, 1903, the Tillson Co. sold to defendants for \$10 all the limbs and tops of trees. . . . In May, 1903, the Tillson Co. removed all the logs and good timber not sold to defendants.

Defendants allege that, having purchased these limbs and tree tops, they entered into an agreement with plaintiff for a further extension of time for their removal. This plaintiff denies. . . . In the summer of 1903 defendant Johnson . . . removed one load; later on defendant Kenny desired to get a load, and was prevented by plaintiff. . . .

The case must, in my opinion, turn upon the ownership of the limbs and tree-tops, and if the Tillson Co. became owners by purchase from Mrs. Copp, and defendants by purchase from the company, then defendants have the right to remove them, even after the expiration of the time mentioned in the

original agreement; and negotiating for and obtaining an extension of time did not affect their legal position. I hold that the limbs and tree-tops are included in what the Tillson Co. purchased, and that the tree-tops are not brush, unless the company so determined—and if the company so determined, they were to be left on the land and piled, the object of that manifestly being for the purpose of burning in clearing the land.

I think *McGregor v. McNeil*, 32 C. P. 538, governs this case.

[*Johnston v. Shortreed*, 12 O. R. 633, referred to.]

If obliged to determine the question of fact as to alleged agreement for a further extension of time to defendants, my conclusion would be . . . that defendants have not established that agreement. The onus was upon them. This must be considered in dealing with the costs. Further, as to costs, defendants were warned by the Tillson Co. that in getting the stuff off plaintiff as tenant would have to be considered.

In dismissing the action, I limit the costs which plaintiff is to pay to defendants to the sum of \$80.

JULY 4TH, 1904.

DIVISIONAL COURT.

RE MUMBY.

Will—Construction—Absolute Gift to Widow unless She Remarries—Death of Widow without Remarrying.

Appeal by Charity V. Mumby and Charles J. Mumby from order of STREET, J., 3 O. W. R. 146, declaring that upon the true construction of the will of the deceased Charles Henry Mumby, his widow, Margaret Ann Mumby, not having married again, had, under and by virtue of the devises and bequests in the will contained, at the time of her death an estate in fee simple in the real estate and an absolute interest in the existing personal estate owned by the testator at the time of his death.

G. H. Kilmer. for appellants.

D. L. McCarthy, for the official guardian and other parties in the same interest.

M. Wright, Belleville, for executors.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.—I am of opinion that my brother Street's view was the right one, and that his order should be affirmed.

It is contended by the appellants that the widow took only an estate during widowhood, but it will be observed that upon that view as to the effect of the will no disposition is made of the remainder expectant on the determination of the widow's estate in the event of her not marrying again, the only disposition of it being that which was to take effect in case she should marry again.

That the testator intended that there should be an intestacy in any event is a priori most unlikely, and the absence of any provision as to the disposition of the property upon the death of his wife in case she should not have married again strongly favours the view that the testator did not intend that the absolute estate which the language of the earlier part of the will indicates that he intended to give to his wife, should be taken from her unless she should marry again.

The apparent difficulty arises from the use by the testator of the word "while" in the sentence following the description of the property: "while the said Margaret Ann Mumby remains my widow." Treating these words as meaning that the estate and interest of the wife are to be absolute if she remains a widow, the language of the will accords with what was the apparent scheme of it, and there is no intestacy in any event.

I am of opinion that the will may be so read, or that, if it may not, the sentence I have quoted should be rejected as repugnant to the estate which is given by the preceding words of the will. A different construction, besides leaving one event unprovided for, requires, as my brother Street points out, the entire rejection of the strong words in which the absolute interest is originally given.

Counsel for the appellants relied on *Sheratt v. Bentley*, 2 Myl. & K. 149, but that case is useful only as illustrative of the principle of construction upon which it was decided, which was, that where the general intention of the testator can be collected upon the whole will, particular terms which are inconsistent with that intention may be rejected as introduced by mistake or ignorance as to the meaning of them on the part of the testator.

Counsel for the appellants sought to apply this principle as it was applied in *Sherratt v. Bentley*, by striking out the words "her heirs, executors, administrators, and assigns, to and for her and their sole and absolute benefit according to the nature and quality thereof respectively;" but I would, instead of doing that, in order to carry out what appears to me to have been the general intention of the testator,

apply it by rejecting the words "while the said Margaret Ann Mumby remains my widow."

In *Sherratt v. Bentley*, words somewhat similar to those which we are asked by the appellants to reject, were rejected. The words which the Court in that case refused to reject were "after the decease of Margaret Harrison," and it was pointed out by the Lord Chancellor that if they were rejected the will would have contained "two gifts quite inconsistent and repugnant." In this case, on the other hand, if the sentence which I would reject be rejected, the will is made consistent in all its parts and contains a complete disposition of the whole of the testator's property, leaving no event unprovided for.

I would affirm the order of my brother Street, and dismiss the appeal with costs.

JULY 4TH, 1904.

DIVISIONAL COURT.

TURNER v. TOURANGEAU.

Execution—Fi. Fa. Lands—Division Court—No Return of Nulla Bona by Bailiff of Court in which Judgment Recovered—Sale under—Execution—Validity—Change in Statute.

Appeal by defendant from judgment of FERGUSON, J., ante 74, setting aside as void an execution against lands, and all proceedings under it, including the sale of the lands of the execution debtor thereunder, with costs.

F. E. Hodgins, K.C., for defendant.

A. H. Clarke, K.C., for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.— . . . My late brother Ferguson, acting upon the assumption that the governing Act was 57 Vict. ch. 23, sec. 8, and following *Burgess v. Tully*, 24 C. P. 549, held that, inasmuch as there had been no nulla bona return by the bailiff of the Court in which the judgment was recovered, the execution against lands was a void proceeding, and that everything founded upon it was void also.

But for the change which was made in the language of sub-sec. 5 of sec. 8 of 57 Vict. ch. 23, when the statutes were last consolidated, and that provision became incorporated in sec. 230 of R. S. O. 1897 ch. 60, I would . . . agree

in the conclusion of my learned brother that the execution against lands was void because it was not addressed to a bailiff of the 7th Division Court, and there was, therefore, no *nulla bona* return by a bailiff of the Court in which the judgment was recovered. . . . [Jones v. Paxton, 19 A. R. 163, referred to and distinguished.]

In framing sec. 230 of R. S. O. ch. 60, 57 Vict. ch. 23, sec. 8, is recast, and the provision as to the *nulla bona* return is at the beginning instead of at the end of the section, and it is not that a return shall be made by a bailiff of the Court in which the judgment was recovered, but "by a bailiff in the Court in which the judgment was recovered."

I have been unable to find any amending Act antecedent to the Revised Statutes making the change which was made by substituting "in" for "of." The change, however, in my opinion, made an important alteration in the law, and was not the result of a slip in the work of revision. . . .

By sec. 107 of the Division Courts Act, where an execution is required to be executed elsewhere than in the division in which the action is brought, it may, in the election of the party, "be directed to be executed by the bailiff of the division in or near to which it is required to be executed, or by such other bailiff or person as the Judge or clerk issuing the same orders."

The object of the provision (sec. 230), I take it, was to prevent an execution against lands being issued until the goods of the debtor had been exhausted, or it was ascertained that he had no goods within the county in which the judgment was recovered, and to prevent the costs of unnecessary proceedings being incurred—an object which is better attained if the course allowed by sec. 107 is taken than if that of directing the execution to the bailiff of the Court in which the judgment was recovered is adopted.

It may well be that it was to meet this case that the change was made in the course of the revision, and the provision as it now stands may well be taken to mean that the return of *nulla bona* may be made by any bailiff who may under the Act lawfully execute the process, and that his return is to be made in the Court in which the judgment was recovered, "in" being the equivalent of "into" or "to."

However that may be, upon the point in question the provisions of sec. 230 are not, in my opinion, in effect the same as those of the repealed Act the place of which that section took, and as respects transactions, matters, and things subsequent to the time when the Revised Statutes took effect, the provisions contained in them are to prevail: 60 Vict. ch. 3, sec. 9, sub-sec. 3.

That the case was one in which the provisions of sec. 107 were properly resorted to, is clear. The execution debtor . . . resided within the limits of the 2nd Division Court, and . . . the summons was issued to that Court for service, and was served by Wright, the bailiff of it to whom the execution against goods was directed.

Upon the whole, I am of opinion that the execution creditor had complied, both in the letter and in the spirit, with the provisions of sec. 230, so as to entitle him to have the execution against lands issued; that it was not a void but a regular proceeding; and that plaintiff's attack upon it . . . fails.

Appeal allowed with costs and action dismissed with costs.

If defendant offers, upon payment of the judgment debt and costs and the costs of the litigation in this Court, to give up the land, no order will issue for 3 months, to enable plaintiff, if he desires, to take advantage of the offer.

ANGLIN, J.

JULY 5TH, 1904.

CHAMBERS.

RE CROSSMAN v. WILLIAMS.

*Appeal—Right of—Master's Report in County Court Action
—Forum—"Judge in Chambers"—Prohibition.*

Motion by defendant by way of appeal from report of local Master at Windsor, upon a reference in a County Court action under secs. 46 and 47 of the County Courts Act, or for prohibition. By sec. 49 of the Act the appeal is "to a Judge in Chambers or to the Court."

W. M. Douglas, K.C., for defendant.

R. F. Sutherland, K.C., for plaintiff.

ANGLIN, J., held that a Judge in Chambers means a Judge of the County Court in Chambers, not a Judge of the High Court; and that the appeal failed for want of jurisdiction to entertain it.

Defendant asked in the alternative for an order of prohibition. As the matter dealt with by the Master was *prima facie* within his powers, and defendants had a clear remedy by appeal to the County Court or to a Judge of that Court in Chambers—a remedy still available if the Judge should see fit to extend the time for appealing—it was not a proper case for the exercise of the extraordinary remedy of prohibition.

Motion dismissed with costs.

ANGLIN, J.

JULY 5TH, 1904.

WEEKLY COURT.

ADAMS v. COX.

Receiver—Equitable Execution—Interest of Debtor under Will—Restraint on Anticipation—Arrears of Income—Contingent Interest—Dependence on Will of Another—Rights of Creditors.

Motion by plaintiff, a judgment creditor of defendants Alice R. Cox and Evelyn S. Cox, for an order appointing plaintiff receiver by way of equitable execution of the interest of Alice R. Cox in the estate of her father, the late J. G. Worts, and of her interest in the estate of her brother, the late T. F. Worts, and of the interest of Evelyn S. Cox in the estate of her grandfather, the late J. G. Worts.

J. J. MacLennan, for plaintiff.

W. Laidlaw, K.C., for defendants Alice R. Cox and Evelyn S. Cox, conceded plaintiff's right to the order as to the interest of Alice R. Cox in her late brother's estate; but contended that the entire interest of Alice R. Cox in her father's estate was subject to restraint on anticipation, and that the interest of Evelyn S. Cox was contingent.

C. W. Beatty, for executors and trustees under wills of J. G. Worts and T. F. Worts.

W. N. Tilley, for H. S. Mara, the holder of a prior receivership order.

ANGLIN, J.—Although by the will of the late J. G. Worts his daughter Mrs. Cox is restrained from alienating or anticipating her income, some portion of that income may have accrued due before the date of plaintiff's judgment and remain unpaid. The material before me does not establish this to be the case. Upon the authorities, only such moneys, if any, under the circumstances of this case, would be a proper subject for such an order as plaintiff seeks: *Whiteley v. Edwards*, [1896] 2 Q. B. 48; *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559; *R. S. O. 1897 ch. 163*, secs. 3 and 21. The Court should not be asked to make an order which may, for want of a subject for its operation, prove wholly nugatory and useless. To prevent this, plaintiff should have shewn that there is some income of defendant Mrs. Cox of which the Court might properly and effectually constitute him receiver. Having failed to shew this, he is not entitled to the order as to Mrs. Cox's interest.

By the will of her grandfather the interest of Miss Cox is made contingent upon her mother's failing to make a will in favour of some other person, or to restrain her daughter from anticipation and alienation, should she make a will in her favour. A receiver will not be appointed of property the enjoyment of which by the debtor is wholly dependent on the will of another person: *Regina v. Lincolnshire County Court Judge*, 20 Q. B. D. 167; *Re McInnes v. McGaw*, 30 O. R. 38.

Order made appointing plaintiff receiver, in the usual form, subject to the rights of H. S. Mara, who has a prior receivership order, and to the claims of all other persons having valid incumbrances, of the interest of Mrs. Cox in the estate of T. F. Worts.

No order as to costs except that plaintiff shall pay those of the executors and trustees of the will of J. G. Worts, which he may add to his claim against Mrs. Cox, as a first charge upon, but only to the extent of, any moneys realized under the order now granted.

It is not advisable or proper to determine now the effect of this order upon rights of other creditors of Mrs. Cox.

BRITTON, J.

JULY 5TH, 1904.

TRIAL.

CAMPBELL v. POND.

Contract—Specific Performance—Parent and Child—Maintenance of Parent—Promise to Make Provision by Will—Part Performance—Action against Executors—Damages—Quantum Meruit—Moneys Disbursed.

Action for specific performance, tried at Woodstock without a jury.

J. P. Mabee, K.C., and S. G. McKay, Woodstock, for plaintiff.

J. W. Mahon, Woodstock, for defendants.

BRITTON, J.—The action is by a daughter of the late William Smith against the executors of his will.

The deceased was a widower advanced in years and having no one to keep house or care for him. Plaintiff is a married woman living with her husband, but travelling with him about the country and having no settled home. In the early part of 1903 plaintiff . . . received a letter, written . . . at the request of deceased, requiring plaintiff to go home, and she went at once to her father at Woodstock.

Her sister Mabel was at home sick with an incurable disease. After the arrival of plaintiff at home she and her father made this agreement:—Plaintiff was to stay at home and take care of Mabel until she died, and after the death of Mabel plaintiff was to furnish a suitable housekeeper for deceased, keep the house in repair, pay the taxes, send the money for all necessary maintenance of deceased during his life, and at his death plaintiff was to have the 2 houses owned by deceased, and the contents of the house in which deceased then resided. This agreement was made after consultation with plaintiff's husband and his assent obtained. Plaintiff at once entered upon her duties. Mabel died on 5th April, 1903. Plaintiff then went to Sunderland, and arranged with her mother-in-law, Jane Campbell, to go to Woodstock and take care of deceased and his home.

There was no contract in writing. Plaintiff alleges performance on her part, and further that her father made a will in the early part of 1903 in her favour, upon the lines of this agreement, but on 2nd December, 1903, he made another will giving all his property to his two surviving daughters, namely, plaintiff and Mary Jane Pond, wife of one of the defendants, "equally, share and share alike." William Smith, father of plaintiff, died on 19th March, 1904.

The cases cited by counsel for defendants make it clear that what was done by plaintiff cannot be regarded as sufficient to constitute part performance of the verbal agreement, even if a clearly defined complete verbal agreement has been proved: *Turner v. Prevost*, 17 S. C. R. 283; *Campbell v. McKerricher*, 6 O. R. 85; *Orr v. Orr*, 21 Gr. 397; *Tibb v. Tibb*, 24 Gr. 487; *Smith v. Smith*, 29 O. R. 309.

In *Maddison v. Alderson*, 8 App. Cas. 467, an intestate induced a woman to serve him as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by a verbal promise to make a will leaving her a life estate in land, and afterwards signed a will, not duly attested, by which he left her the estate. It was held that there was no contract, and, even if there had been, and although the woman had wholly performed her part by serving till the intestate's death without wages, yet her service was not unequivocally and in its own nature referable to any contract, and was not such a part performance as to take the case out of the operation of the Statute of Frauds.

Plaintiff claims in the alternative damages for breach of the alleged contract, and also for money paid for repairs, taxes, maintenance, expense of nursing, attendance, etc. This

branch of the case must be dealt with. It is, upon the evidence, clear beyond doubt that plaintiff, after going home in response to her father's request, and after ascertaining the need of some one to take charge at home, entered into a business relation with her father. She at once took upon herself the responsibility of house-keeping and of managing. She paid the taxes and set about having repairs done with her own money. After the death of Mabel, plaintiff went to Sunderland and arranged with her mother-in-law to give up business there and go to Woodstock. Jane Campbell and plaintiff went to Woodstock, where Jane was installed as housekeeper, and then a few days after plaintiff joined her husband. Jane Campbell is not related to deceased otherwise than by marriage, and she certainly would be entitled to reasonable compensation from deceased or his estate for her services, were it not that she was there on that work pursuant to arrangement with plaintiff. Jane Campbell makes no claim.

The deceased knew that plaintiff was paying for the repairs, and from the undisputed facts it must be inferred that she was doing these in expectation of being paid in some way for them, and in some other way than in sharing equally with her sister in their father's property. Plaintiff has improved the property by at least the amount she has expended upon it. No reason is suggested for her doing this other than as a matter of business. Plaintiff is not, so far as appears, a person of much means, and the relations between her and her father were, for a while after her marriage, a little strained. The work she was asked to do was not wholly woman's work, but the father, at the time when he employed plaintiff, chose her in preference to the son-in-law, and did so knowing that plaintiff would herself be away, and that, while the money was to be provided by plaintiff, the work would be done by some other person engaged by plaintiff for the purpose. The sister of plaintiff (wife of defendant Pond) had lived at home and kept house for her father, and, although not under the same or a similar arrangement to that alleged by plaintiff, yet under an agreement which was a matter of business between her and her father.

Plaintiff is not entitled to specific performance of the alleged agreement, and she is not entitled to damages for breach of that agreement; she is entitled to be repaid the money paid out by her at the request of her father, and she is entitled to remuneration for service procured by her for her father at his request. See *McGugan v. Smith*, 21 S. C. R. 263; *Biehn v. Biehn*, 18 Gr. 497; *Walker v. Boughner*, 18 O. R. 448; *Murdoch v. West*, 24 S. C. R. 305; *Cross v. Cleary*, 29 O. R. 542.

Put upon the basis of quantum meruit, this case is distinguishable from *Mooney v. Grout*, 6 O. L. R. 521, 2 O. W. R. 978. There is here every reason to suppose that the deceased thought that plaintiff expected to be paid; and there is more; there was an understanding, while the services were being performed, that plaintiff should be remunerated. The evidence of the facts which warrant the inference that plaintiff is entitled to be paid was fully corroborated.

I think plaintiff is entitled to the sum of \$500 to cover the repairs, the taxes paid, money expended in papering house, money expended in maintaining the house, and for the nursing, care, and attendance in housekeeping; said sum to be in full of all claims for money and services, to be paid to her with costs out of the estate, before any division, and over and above what plaintiff is entitled to under her father's will.

Judgment for plaintiff for \$500 and costs.

JULY 5TH, 1904.

DIVISIONAL COURT.

COHEN v. HAMILTON STREET R. W. CO.

*Street Railways—Injury to Person—Collision with Vehicle—
Negligence—Contributory Negligence—Proximate Cause
—Jury.*

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., after trial of the action with a jury at Hamilton, dismissing it with costs. The action was brought by the widow and personal representative of William Cohen, deceased, to recover damages for his death, which was caused by a collision between a waggon in which he was driving and an electric car of defendants as it was going westward along Herkimer street, in the city of Hamilton, the collision having occurred, as plaintiff alleged, owing to the negligence of defendants. In answer to questions the jury found: (1) that the death of Cohen was caused by the negligence of defendants; (2) that the negligence was that "seeing Cohen's condition the motorman should have stopped his car sooner;" (3) that deceased was negligent to some extent; (4) that deceased by the exercise of reasonable care might have avoided the accident; (5) that, although deceased was guilty of negligence, defendants by the exercise of reasonable care might have avoided the accident; (6) that Cohen's death was not

due to an inevitable accident for which neither he nor defendants were to blame; and they assessed the damages at \$1,700.

G. Lynch-Staunton, K.C., for plaintiff.

D. C. Ross, for defendants.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.—According to the uncontradicted testimony, the car was proceeding at a reasonable rate of speed, and the motorman was in full control of it, and rang the gong between James street, the street immediately east of McNab street, and McNab street, and again violently when he saw the deceased approaching Herkimer street, towards which he was driving, and when the car was a short distance east of McNab street. According to his testimony, he soon realized that an accident was likely to happen if the deceased did not stop or the car was not brought to a standstill, and he then applied the brake and afterwards reversed his car, but without succeeding in stopping it in time to avoid the collision.

The deceased was probably under the influence of intoxicating liquor, and, at all events, according to the evidence, was paying no heed to the approaching car, but driving or permitting his horse to go on without directing or controlling his movements, and with the lines hanging slack. The deceased was driving down McNab street, and when he reached Herkimer street his horse and waggon were turned west on Herkimer street close to the sidewalk; apparently after this, —though the testimony on this point is not very clear—he without stopping proceeded to cross Herkimer street, and had passed over the south track and was on the north one when the collision occurred.

There was evidence that the deceased had a whip in his hand, and according to the testimony of one of the witnesses given at an inquest which was held immediately after the accident, he struck his horse with it, though the witness who gave that testimony at the inquest withdrew it at the trial, and then said he was not sure that that incident had occurred.

It appears to me that the negligence of the deceased was clearly the proximate cause of the accident, and that no jury could, upon the evidence, acting reasonably, have found otherwise.

Speaking generally, it is, no doubt, the duty of a motorman to regulate the movement of his car, and to hold it under such control that in case of emergency it can be quickly stopped; it is also his duty, at a point when a cross

street intersects the track on which he is proceeding, to be on the look-out for persons on the intersecting street who are approaching the track, either on foot or riding or driving, and in case it becomes apparent to him, or should reasonably be so, that an accident is likely to happen if he does not bring his car to a standstill, it is his duty to act promptly and to use all available means at his disposal to stop his car.

In this case it is to be borne in mind that the motorman had to keep a look-out to his right and ahead of him as well as to his left, and that, as the car was moving at the rate of six or seven miles an hour, and therefore passed over about ten feet of the track every second, he had very little time in which to do all that the jury thought it was his duty to have done. Although he admits that he observed that the deceased was apparently paying no attention to the approaching car, it may well be that the motorman did not apprehend and had no reason for apprehending that the deceased would keep on his way in spite of the ringing of the gong and cross the track upon which the car was moving.

There is, in my opinion, a wide difference between this case, where the motorman, who has not been guilty of any negligence in the first place, is confronted with a sudden emergency due entirely to the negligence of the driver of a horse and vehicle, and a case where the motorman has been guilty of negligence in the first instance, such as running his car at an excessive rate of speed, not having it under control, or the like.

In the one case his duty as to meeting the sudden emergency is much greater than in the other, and in the former case neither justice nor the law demands that he shall, at the peril of his employer having to answer in damages for the consequences of a collision happening between his car and the vehicle, do the very best that it would have been possible for any one to have done under the circumstances.

What was said by Hagarty, C.J., and Burton, J., in *Follett v. Toronto Railway Co.* (1888), 15 A. R. 346, at pp. 348, 349, and 353, would appear to indicate that, in their view, it was at least doubtful whether the employer would in such a case as this be liable even though the motorman might by the exercise of reasonable care have avoided the accident; but, however that may be, the ratio decidendi of the case was that a motorman who is confronted with a sudden emergency such as the motorman in this case had to face does not render his employer liable for the consequences of an accident, though the motorman err in judgment in the means he adopts to avoid it, and though it might have been avoided had he taken some other course than that which he adopted.

The distinction I have referred to is also recognized by King, J., in *Inglis v. Halifax Electric Tramway Co.*, 30 S. C. R. at p. 261.

I doubt very much whether in this case there was any evidence to go to the jury that the motorman committed an error in judgment, and I am clearly of opinion that at the most the worst that he was chargeable with was an error of judgment not amounting to negligence, for negligence is the failure to take due care according to the circumstances.

I refer also to the recent case of *Reynolds v. Thomas Tilling Limited*, 19 Times L. R. 539, affirmed in appeal, 20 Times L. R. 57.

The appeal should, in my opinion, be dismissed with costs.

ANGLIN, J.

JULY 6TH, 1904.

WEEKLY COURT.

RE PAKENHAM PORK PACKING CO.

GALLOWAY'S CASE.

Company—Winding-up—Contributory—Allotment of Shares—Preference Shares—Common Shares—Delegation of Power of Allotment—Terms of Allotment—Ratification.

Appeal by liquidator from certificate of Mr. McAndrew, official referee, upon a reference for the winding-up of the company, refusing to place Galloway upon the list of contributories in respect of 16 shares of preference stock; and upon cross-appeal by Galloway from the finding of the referee that Galloway should be placed upon the list of contributories in respect of 8 shares of common stock.

S. B. Woods, for liquidator.

R. J. McLaughlin, K.C., for Galloway.

ANGLIN, J.—Upon the liquidator's appeal he conceded that the provisions of sec. 22 of the Ontario Companies Act were not complied with.*

The result of this non-compliance is that the entire capital stock remained common stock and was issued as such. In respect of his application for preferred shares Galloway, therefore, was allotted, if anything, common stock. Whatever might be his position if he knowingly accepted such stock, or if there were circumstances shewing any acquiescence by him in its allotment to him, there was no evidence that he was ever aware of any facts upon which an estoppel could be founded against his right to set up that he had not re-

ceived that for which he applied. Upon this ground, he was not liable in respect of the 16 preference shares for which he subscribed, but which never existed.

As to the cross-appeal. The directors professed to exercise the power of allotment conferred by sec. 26 of the statute, by passing a resolution on 30th May, 1902, "that the secretary be instructed to allot all stock as applications are passed in." As a present allotment this resolution was not effective, because Galloway's application was not made till 3rd October, 1902. As a delegation of the power of allotment to the secretary, it would be invalid. The resolution could not be treated as a general or open offer by the company. But, if it might be so regarded, it should be taken to authorize allotments only upon the terms of the prospectus. If such an offer, its terms were not accepted by Galloway, his counter-proposal, upon terms essentially different, was never accepted by any person or body having authority to bind the company. The evidence does not shew sufficient ratification of the secretary's action in accepting terms wholly different from those he was authorized to give. The directors do not appear to have ever considered this application or the action taken upon it. There was never any binding agreement in respect of this stock. Upon this ground Galloway should be relieved from liability.

Liquidator's appeal dismissed and cross-appeal allowed. Costs out of the estate. Liquidator allowed to appeal, upon terms that the respondent's costs of the proposed appeal, as well as of these appeals, shall in any event of that appeal be paid out of the assets of the company in liquidation.

JULY 6TH, 1904.

DIVISIONAL COURT.

HENRY v. GRAND TRUNK R. W. CO.

Railway—Injury to Passenger—Death—Action by Widow—Evidence—Res Gestae—Statements of Deceased—Statements of Defendants' Agent—Discrediting Witness.

Appeal by plaintiff from judgment of MEREDITH, J., directing a nonsuit in an action under Lord Campbell's Act by the widow of J. C. Henry to recover damages on behalf of herself and two infant children for the death of her husband by the alleged negligence of defendants. The deceased entered a car of defendants at the railway station at Palmers-ton, which car he supposed was attached to a train timed to leave for Clifford about noon; one Shea, the station agent, told him, after the car had begun to move, that it was not

going to Clifford; he endeavoured to get off the car while it was moving, and received fatal injuries.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., TEETZEL, J.

W. M. Douglas, K.C., for plaintiff.

W. R. Riddell, K.C., and H. E. Rose, for defendants.

MACMAHON, J.—Shea was called as a witness and said: "When I entered the car, I said to Henry, 'Hello John, what way are you going to-day?' He said he was going home to Clifford, so I said, 'This coach is coming off here to-day; come back to the next car with me.'" He (Shea) then picked up two "grips" which some one had left in the car, and Henry arose from his seat and followed close to his shoulder as he passed out of the south door to cross over to the next car, and as he reached the door of the next car he turned and saw Henry in the act of getting off or jumping off the lower step of the car they had left; that Henry had his back to the south, and he called to him not to get off that way, and just as he did so Henry stepped off; and that the effect of his stepping off in that way, with his back to the engine, would be to swing him around into the moving object, and if he had stepped off the train with his face towards the engine he would have got off all right. Shea stated the car started to move at the time he spoke to Henry and told him that coach was coming off.

Richard Dowling said he heard of the accident "not a great while after" it occurred, and, knowing Henry, went to the station, where he saw Shea and asked him how it happened; that Shea said he "went into the car to see if there was anybody there and he saw Mr. Henry and told him he would have to get off, as this car would not go north," and that he never mentioned about taking Henry into another car. Alexander Moncreif, of Harrison, was at the Palmerston station when the accident happened, and heard the conversation between Shea and Dowling, and corroborates the latter as to the statements made by Shea.

The only witness called who saw the accident was William Moore, who said that Henry did not seem to be jumping off, but appeared as if he lost his balance or had got a shake and came off. He fell down on the platform and rolled in amongst the wheels.

Moore and Henry Torrance state that after Henry was injured, and while lying on the station platform, he said to Shea that he (Shea) was responsible for his being injured, and that Shea made no reply.

Shea was called by the plaintiff, but, by leave of the trial Judge, counsel for the plaintiff was allowed to call Dowling and Moncreif to prove that he made on another occasion the statement that "he told Henry that he would have to get off the car, as it would not go north," and that he never mentioned that he told him to follow him into the other car. If he did not tell him that, it would be inconsistent with his evidence at the trial.

Had the statement spoken of by Dowling and Moncreif been made directly after Henry was injured, it might have been part of the *res gestæ*, and therefore receivable in evidence, according to the case of *Hermis v. Chicago R. R. Co.*, 50 N. W. Rep. 584, where it was held, in an action against a railway company for the killing of a child, that evidence as to what the engine driver said about the accident, within a few minutes after the accident, was receivable in evidence as part of the *res gestæ*. See also *Taylor on Evidence*, 9th ed., sec. 583.

The statement said to have been made by Shea in the presence of Dowling and Moncreif was a considerable time after the event, as Dowling heard of the accident while in the town of Palmerston and came up to the station to see Henry, at which time Shea could not be considered an agent to make admissions binding on the defendants.

However, apart from these considerations, Shea having been called by the plaintiff gave his account of what he said to Henry; that he told him the car he was in was not going to Clifford; and that he asked him to come into the next car. The evidence of Dowling and Moncreif was therefore for the purpose of discrediting that statement, and if discredited there was no evidence as to how Henry was injured, and the action must fail.

Then as to the accusation made by Henry against Shea, that the latter was responsible for the injury. There was no fact charged against Shea by reason of which it was imputed to him he had caused or contributed to the accident. And Shea said he did not answer because Henry was in great pain, and he did not wish to irritate him by replying. However, Shea is not the defendant, and therefore, even if there had been some fact charged against him as contributing to the accident, his neglect or refusal to answer cannot be evidence against the defendants.

The appeal will be dismissed, but I think it should be without costs.

MEREDITH, C.J., gave reasons in writing for the same conclusion.

TEETZEL, J., also concurred.

ANGLIN, J.

JULY 7TH, 1904.

CHAMBERS.

RE McLEOD AND TOWN OF EAST TORONTO.

Municipal Corporations—Annexation of Town to City—Petition for Submission of By-law—Investigation as to Numbers and Qualifications of Petitioners—Delegation to Town Clerk—Withdrawal of Names of Petitioners—Addition of New Names—Time—Statute—Directory or Imperative.

Motion by Alexander McLeod for an order in the nature of a mandamus directing the municipal corporation of the town of East Toronto to submit a by-law for the annexation of the town to the city of Toronto, upon the terms set out in a petition presented to the town council within the time limited by the Municipal Act in that behalf.

W. E. Middleton, for applicant.

W. H. Grant, for town corporation.

ANGLIN, J.—On 13th June the petition referred to was presented to the municipal council, bearing 226 signatures of persons purporting to be electors. The Municipal Act, 3 Edw. VII. ch. 19, sec. 26, sub-sec. 4, is as follows: "In case a petition signed by 150 electors of any town or village is presented to the council of such town or village asking that a by-law be submitted for the annexation of such town or village to an adjacent village, town, or city . . . it shall be the duty of such council to submit to the vote of the electors of the said town or village a by-law for the annexation of the said village or town, and the said council shall forthwith prepare a by-law in accordance with the prayer of the petition, and shall submit the same to the said electors for approval or otherwise within four weeks after the receipt of the petition by the said council."

On receipt of this petition, the council, instead of itself investigating the sufficiency in numbers and qualifications of the petitioners, referred this matter to the town clerk for inquiry and report. That officer reported, at a special meeting held on 21st June, that "of the 226 signatories only 162 thereof appeared upon the assessment roll as owners." The

"electors" entitled to vote upon such a by-law include certain leaseholders, as well as freeholders: sec. 26, sub-sec. 8, and sec. 19, sub-sec. 1 (a). The clerk probably used the word "owners" in the sense of freeholders. Of the remaining 104 signatories, some, as leaseholders, may have been qualified to petition. This question was not raised in argument, and I merely direct attention to it as affording a further reason, in addition to those mentioned below, for holding that it has not been satisfactorily established that the petition in question is insufficiently signed.

At the meeting of 21st June one Harvey Moore, an elector, appeared, and, under sec. 336 of the Act, petitioned to be heard in opposition to the proposed by-law. The clerk further reported that of the 162 signatories, whom he found to be duly qualified, 20 had requested him to have "their names cancelled from the petition." If these withdrawals are permissible, the number of remaining petitioners reported qualified is reduced to 142. One William Fenton then addressed the council. He contended that persons who had signed the petition could not withdraw, and also presented a further petition with ten additional signatures, which he swears are those of duly qualified electors. This supplemental petition the council declined to receive, and subsequently passed a resolution that "no further action be taken in the matter."

Mr. Middleton contends:

(a) That the council had no power to refer the question of the qualifications of these petitioners to their clerk for investigation and meantime to defer action.

(b) That petitioners having once signed the petition cannot withdraw their names.

(c) That if withdrawals are to be permitted, additions of signatures must also be allowed.

The presentation of a petition signed by at least 150 electors is the condition precedent upon which the Legislature has said that "it shall be the duty" of the council to act. Some convenient method must be taken of ascertaining whether this condition has been in fact complied with: *Chatham v. Township of East Dover*, 12 S. C. R. at p. 338. I am not prepared to hold that the reference made to the town clerk was improper for that purpose. For this investigation there should be allowed a reasonable time, necessarily limited, however, if the statutory direction for the submission of the by-law to the electors within four weeks after receipt of the petition is to be carried out. The requirements of sec. 338 must also be considered. It is obvious that, if

the petition is to be deemed to have been received when presented, i.e., on 13th June, the council could not, on 21st June, when it considered the clerk's report, comply with sec. 338, sub-secs. 1 and 2, requiring at least 3 weeks' publication of the proposed by-law before the date fixed for holding the poll—and also carry out the direction requiring the submission of the by-law itself within 4 weeks after receipt of the petition. In my opinion, however, notwithstanding the use of the word "shall" in this latter provision, it may be read as directory only. This view is strengthened by the presence in the same sub-section of the clearly mandatory words, "it shall be the duty of such council to submit."

The law upon the right of petitioners to withdraw their signatures is in an eminently unsatisfactory position. The Court of Appeal in *Gibson v. North Easthope*, 21 A. R. 504, 24 S. C. R. 707, was evenly divided upon this question, and the ultimate decision in that case did not depend upon its solution. *Re Misener v. Wainfleet*, 46 U. C. R. 457, is probably now of very doubtful authority. The report of *In re Canada Temperance Act*, 1878, and *The County of Kent*, Cass. S. C. Dig. 106, is far from satisfactory. The inclination of my own opinion, in view of the very limited purpose of the petition, is against the existence of such an absolute unqualified right of withdrawal. The office of the petition is merely to set in motion the machinery which ultimately affords to the petitioners themselves, with the other electors, ample opportunity of voting freely for or against the by-law to be submitted.

The provision of secs. 336 and 337, invoked by Mr. Grant on behalf of the municipal corporation, as applicable to this petition, and sanctioning the course taken by the council on the protest of Mr. Moore, satisfy me that only signatures shewn by evidence produced to the council to be "not genuine," or to have been "obtained upon incorrect statements," and to be those of persons to whose wishes the proposed by-law is contrary, can be removed from such a petition. Though the bearing of these sections upon the right of withdrawal does not appear to have been adverted to in *Gibson v. North Easthope*, I cannot but think they afford a cogent argument against the existence of an absolute and unqualified right of withdrawal after presentation or receipt of the petition upon which the council is directed to act forthwith. The right of removing signatures is, in my opinion, confined to persons whose names are shewn to have been obtained by fraud and in bad faith. The material filed on behalf of the corporation does not suggest that there was any evidence before the coun-

cil upon which it could be satisfied that the signatures of any of the 20 persons who are said to have sought to withdraw their names were obtained fraudulently or in breach of good faith. Such grounds for removing their names are said to have been urged by Mr. Moore in addressing the council, but there is nothing to shew that there was, either in the letters of the persons seeking to withdraw, or in any other form, any evidence whatever to sustain them. Nor does it appear that the council had any other means of knowledge that any signatures to the petition were improperly procured (Re Robertson and North Easthope, 16 A. R. 214), even if such knowledge might be substituted for the evidence required by the statute.

If the views which I have stated be correct, the council on June 21st had before it a petition with at least 162 signatures of electors, for the withdrawal or cancellation of which no case had been made out. This renders it unnecessary for me to consider the question argued as to the addition of further names.

With a sufficiently signed petition before it, the council was bound to proceed to submit the by-law for annexation to the electorate in accordance with the prayer of the petition. This cannot now be done within the 4 weeks allowed by the statute, but that provision being directory merely, the delay occasioned by the mistaken course pursued by the council should not be allowed to defeat the rights of the petitioners.

An order in the nature of a mandamus will therefore issue directing the municipal corporation of the town of East Toronto to comply with the prayer of the petition and submit a by-law to the electors within 4 weeks from this date, and for payment by such corporation to the applicant of his costs of this application.

BRITTON, J.

JULY 7TH, 1904.

TRIAL.

BURNS v. MCCARTHY.

Fraudulent Conveyance—Action to Set aside—Previous Action in Respect of Same Conveyance—Different Creditors—Res Judicata—Intent to Defraud Creditors—Evidence of—Subsequent Conveyance—Bona Fide Purchaser for Value without Notice—Equitable Relief in Respect of Purchase Money.

Action to set aside a conveyance as fraudulent and for other relief.

Prior to 1897 plaintiff was the collector of taxes for the township of Anderdon, and defendant John McCarthy was treasurer for that township. They were short in their accounts, and an action was brought against them, with the result that John McCarthy was found indebted to the township and to the present plaintiff in a large sum of money apportioned by the report of the Master as \$388.66 in favour of the township, and \$360.98 in favour of plaintiff. The report was filed on 15th June, 1899; defendant John McCarthy appealed. Judgment was given on 25th September, 1899, confirming the report, and executions against the goods and lands of John McCarthy were shortly afterwards placed in the hands of the sheriff of the county of Essex.

Defendant John McCarthy was in possession of and apparently owned a residence and land, 4 parcels, in all 19½ acres. On 1st August, 1899, he made a conveyance of all his land to his son, defendant Daniel P. McCarthy. The consideration as expressed in the deed was \$2,000. Daniel P. McCarthy was a mariner, not living at home, and had never, since the deed was executed, resided upon the property. This property was all that defendant John McCarthy had, and it was said to be worth \$2,000.

Plaintiff alleged that this deed was executed with intent to defeat and delay the creditors of defendant John McCarthy.

On 28th September, the day on which the writs of *fi. fa.* were placed in the hands of the sheriff, an action was commenced by the township of Anderdon to set aside the conveyance mentioned. On 30th September, 1899, this action was commenced.

The action of the township was brought to trial on 20th April, 1900, and the conveyance impeached was set aside as to all the land mentioned in it, except lot 16, containing 6 acres, upon which the dwelling house and other buildings were erected, and the conveyance was confirmed as to this lot 16. An appeal was taken to the Court of Appeal, and judgment was given on 6th November, 1901, dismissing it.

Pending the trial and final disposition of the Anderdon case, this action stood over. It stood by consent, and there was no agreement that the present plaintiff should be bound by the result of that action. This case was entered for trial and was made a remanet at the November non-jury sittings, 1902.

At the spring sittings, 1903, the case was partly tried by Street, J., when an order was made postponing the trial until the then next sittings in order that plaintiff might add James

Kelly as a party defendant. He was added, and his statement of defence put in. He claimed to be a bona fide purchaser for value. He bought in the summer of 1902, while this action was pending, but apparently before it was actually entered for trial, and after the decision of the Court of Appeal in the Anderdon case. The negotiation for the purchase by Kelly was commenced by Kelly's wife. She wrote to her brother Daniel P. McCarthy. McCarthy replied by letter of 14th July, 1902, saying that he would accept \$1,000; Kelly to pay, in addition to the \$1,000, the balance on the mortgage then standing upon the property. The conveyance was not dated, but it was registered on 15th August, 1902, in the proper registry office.

A. H. Clarke, K.C., for plaintiff.

D. R. Davis, Amherstburg, for defendants.

BRITTON, J.—The matter is not *res judicata* as to the present plaintiff, and there is no estoppel against him. He brought an independent action, and is entitled to have it disposed of on the evidence given on the trial, and the question now affects only the six acres with the residence, &c.

I assume that all the other lands as to which the conveyance was declared, in the other suit, to be void, were sold and proceeds made available for the township of Anderdon, in that action. I do not know what was done with these other lands.

Mr. Davis, counsel for defendants, relied upon the other judgment. I would be glad to follow the decision in the other action if I could, but I do not know what evidence was there given.

The matter must be dealt with in the present action upon its own merits. At the trial plaintiff was not called, but on plaintiff's behalf defendant John McCarthy was called. He bought the property in parcels, employed the builder to put up the residence, and paid all the money for the house built by him, except \$900, and for that sum gave his personal mortgage upon the property.

His story was that in 1890, before the house was built, his son, defendant Daniel P. McCarthy, and he had the following conversation.

The son said: "You have been paying rent; build (or put up) a house." The father replied: "If you advance the money, I will put up the building, and if I am able, I will pay you back, and if not, if you demand deed, I will give it to you." The son assented to this, although the father does not give any clear account of what the son actually did say.

The father says he went on with the building, and did not pay for it with his own money, but got the money from his wife, and did not know where the money came from. Nothing more was heard of the matter until in 1899, after defendant John got into trouble with, and was sued by, the township, and then, at the request of Fred. Davis, a law student, he executed the deed, not only of this residence but of all his property, to his son. The consideration stated is \$2,000, but there was no reckoning and no money then paid. This conveyance was made after the finding by the Master that John McCarthy was liable for a large sum of money and costs, and pending an appeal from the Master's report. John's wife was called for the defence. She stated that, when her son Daniel spoke to his father about building, she had \$500 of the son's money. She was not very accurate about her son's age, but he was not more than about 22 years of age in 1890, when, according to her statement, he deposited this money with her. She says she afterwards got \$504 and then \$600 in 3 instalments of \$200 each. She kept some money in P. O. savings bank, and yet did not produce any bank book or correspondence, nor did she give the slightest corroboration of her evidence. The defendant Daniel P. McCarthy was not called. I can not accept the evidence as establishing that there was any agreement that Daniel should furnish money to build the house, or that he did furnish it, or that there was even a debt due from his father to him. I think the conveyance was made with intent to defraud and defeat the township of Anderdon and this plaintiff, the creditors of John. If the case stood simply against the original parties, this deed should be declared void, and as against all the defendants except James Kelly I so find.

The case against James Kelly stands upon an entirely different footing. It is not shewn that he in fact knew anything about the taking or giving the impeached conveyance at the time it was executed. He did know of litigation, and it may be assumed that he knew of the claims against John McCarthy and of the action by Anderdon to set aside the conveyance, but in that action the conveyance, so far as it affects the land bought by Kelly, was held good, and it was not until after the determination of that action, that defendant Kelly purchased. He bought agreeing to pay to Daniel P. McCarthy \$1,000 over and above balance of mortgage, and he has paid \$200 on account of the \$1,000. Mere knowledge of John McCarthy's insolvency is not enough, even if Kelly did know it: *Molsons Bank v. Halter*, 18 S. C. R. 365. I think Kelly had a right to assume Daniel McCarthy's title to be invulnerable, and that he did so assume it, and that he bought in good

faith, is a purchaser for value, and is not guilty of any intent to defraud, and there is no evidence of any knowledge on his part or notice to him of any fraud in fact or intent to commit fraud on the part of others.

Kelly, upon his own shewing, owes \$800 to his co-defendant Daniel P. McCarthy; and that balance, if it belongs to Daniel, should be available to plaintiff in satisfaction or part satisfaction of his debt and costs.

There should be judgment for plaintiff as against defendants John McCarthy, Mary Jane McCarthy, and Daniel P. McCarthy, with costs, and James Kelly is entitled to costs against plaintiff to be paid by plaintiff to him.

There should be a declaration that the conveyance from Daniel P. McCarthy to him shall, as against plaintiff, stand, subject to the payment of the balance of the purchase money, and that defendant Kelly shall not pay that balance to defendant Daniel P. McCarthy.

I think plaintiff is entitled to the equitable relief asked: see *Buchanan v. Dinsley*, 11 Gr. 132. . . .

Defendants could at least have urged that both actions be tried together, or that the present action should abide the result of the other, or that the evidence used in the former should be available in this. No agreement was shewn to have been made, and I am disposing of the action as to the one parcel of land as if the only action in respect of the conveyance of 1st August, 1899.

Judgment for a declaration that plaintiff is entitled to a lien upon the land to the extent of the unpaid purchase price due by defendant Kelly to defendant Daniel P. McCarthy, so far as may be necessary to satisfy plaintiff's claim and costs and costs of defendant Kelly, which are to be paid by plaintiff and added to his own. The account to be taken by the Master at Windsor of what is due to plaintiff upon the judgment for principal money, interest, and costs, and costs of this action, and a time and place to be appointed for payment one month after account taken, and in default of payment land to be sold and proceeds applied: (1) in payment of costs of sale; (2) a sum to be set apart to answer the amount due by defendant Kelly for unpaid purchase money and interest, which amount is to be ascertained by the Master; and (3) the residue is to be paid to defendant Kelly.

Out of the money set apart to answer unpaid purchase money due by defendant Kelly, there is to be paid to plaintiff the amount of his claim for principal, interest, and costs,

such costs to include the costs ordered to be paid by him to defendant Kelly, and balance, if any, is to be paid to defendant Daniel P. McCarthy.

JULY 7TH, 1904.

DIVISIONAL COURT.

ONTARIO PAVING BRICK CO. v. BISHOP.

*Mechanics' Liens — Contractor — Lien-holders — Pleading—
Amendment — Percentage of Value of Work — Appeals—
Costs.*

After judgment was given in this case (2 O. W. R. 1063) upon appeal by defendant Singer from the judgment of an official referee in a mechanic's lien action, attention was called to the fact that, though the contractor was not entitled to recover, the lien-holders were entitled to have 20 per cent. of the value of the work done by him applied in satisfaction of their liens, and the case was spoken to upon this point and the question of costs.

W. E. Middleton and D. C. Ross, for appellant.

F. E. Hodgins, K.C., for lien-holders.

W. H. Irving, for plaintiffs.

J. E. Cook, for defendant Bishop.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

MEREDITH, C.J.—According to the pleadings of the appellant, as originally delivered, he contested not only the right of the contractor, but also the right of the lien-holders, to recover anything from him, and it was not until 15th December, 1902, that the appellant admitted the right of the lien-holders to anything, even if he then admitted it. On that day he amended his statement of defence by adding to it the following paragraph: "25. The defendant in the alternative pays into Court the sum of \$350 in satisfaction of the cause of action of the plaintiff and other lien-holders and their costs herein."

The amendment was made by leave of the official referee before whom the trial of the action took place, and whose judgment is dated 22nd December, 1902.

From that judgment the appellant appealed to a Divisional Court, on the ground that the referee had refused to

consider the claim of the appellant that the contractor had abandoned the work or was properly discharged from it.

The result of the appeal was, that the judgment was set aside and the case sent back to the referee to be tried out, and the costs of the appeal and reference back were directed to be dealt with as part of the costs of the cause by the referee, and paid by the unsuccessful party upon the reference back.

The cause was then proceeded with before the referee, with the result that he found against the contention of the appellant.

From the second judgment the appellant again appealed, with the result that the Divisional Court reversed that judgment, and directed that the action should, as against the appellant, be dismissed with costs.

According to information which we have procured from the referee, only one of the 13 hours occupied in the first trial was spent before the appellant's statement of defence was amended and the \$360 paid into Court.

Twenty per cent. of the value of the work done by the contractor is the sum of \$317.60, so that the amount paid into Court was probably enough to cover the 20 per cent. and the costs up to the time of payment in.

It is perhaps open to doubt whether the payment in amounted to an admission of liability of the appellant in respect of the claims of the lien-holders to the extent of \$350 inclusive of costs; but, however that may be, upon the trial being resumed on 19th December, 1902, it was made clear that to that extent the claim of the lien-holders was admitted by the appellant.

In view of all the circumstances, a reasonable disposition of the costs up to the termination of the first trial will be to leave each party to pay his own costs.

The costs of the first appeal and of the reference back must be borne as directed by the order allowing the appeal. As we understand the terms of the order as to costs, they are to be borne by the party who was unsuccessful on the reference back. The appellant has succeeded on the reference back, and is therefore entitled to be paid these costs.

The costs of the appeal which came before us must be paid by the respondents, as they failed and the appellant succeeded as to the only matters in controversy upon it.

Subject to the right of the appellant to be paid out of it the costs to which he is declared to be entitled, and to be paid out of it the amount paid to wage-earners (about \$50), the money in Court will be paid out to the lien-holders according to their respective rights in it.

JULY 7TH, 1904.

DIVISIONAL COURT.

BRIDGE v. JOHNSTON.

Indian Lands—Assignment of Right to Cut Timber—Subsequent Conveyance of Land—Registration in Department of Indian Affairs—Priorities—Actual Notice—Conditions of Sale—Rights of Crown.

Appeal by plaintiff from judgment of FERGUSON, J., 6 O. L. R. 370, 2 O. W. R. 738, dismissing the action with costs.

E. D. Armour, K.C., for appellant.

H. G. Tucker, Owen Sound, for defendant.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

MEREDITH, C.J. (after stating the facts):—Plaintiff is the assignee of the original purchaser from the Crown, one Freckelton, of the lands in question, which are Indian lands. The assignment is dated 15th November, 1900, and was registered as provided by sec. 42 of Indian Act on 29th November, 1900. . . . Plaintiff paid the last instalment of the purchase money on 16th February, 1903, but it was not made to appear at the trial whether or not the settlement duties had been performed, so as to entitle the purchaser's assignee to the patent, or whether or not letters patent had yet been issued.

Defendant claims to be entitled to the timber on the land, 10 inches and over in size, as assignee of Jamieson Johnston, to whom Freckelton purported to sell it by an instrument, dated 27th November, 1899. . . .

Neither the assignment from Freckelton to Jamieson Johnston nor the subsequent transfers under which plaintiff claims were registered pursuant to the provisions of sec. 43 of the Indian Act. . . .

Freckelton, by his purchase and the effect of the provisions of the Indian Act, was placed, as against all the world but the Crown, upon the footing of a full and beneficial owner to the same extent as if the land was granted to him by letters patent. Such is the position of a locatee of public lands whose rights are declared in substantially the same language as is used in the Indian Act in declaring the rights of a purchaser of Indian lands: *Church v. Fenton*, 28 C. P. 384, 4 A. R. 159, 5 S. C. R. 239. . . .

Doubtless neither the purchaser Freckelton nor his assignee was entitled to the patent for and the full ownership of the land until the settlement duties were performed, and the purchase money had been paid, but, upon obtaining the patent, the full and absolute ownership of the land, with all the timber then upon it, would pass to him.

There is nothing either in the Act or in the conditions of the sale in any way to restrict the right of Freckelton or his assignee to dispose of his whole interest in the land, including the timber, as he might see fit. What, therefore, was there to prevent him from disposing of his rights in the timber, whatever they might ultimately turn out to be, separately from the land itself? Nothing that I can see. All that the conditions restrain him from doing is the cutting for sale before the patent should be issued, unless under license to the person living on the land, any timber, staves, saw logs, etc. . . .

It does not appear that any license existed at the time of the sale, or that the Crown ever exercised the right which it reserved to put the land under license. . . .

The sale of the timber to Jamieson Johnston was not in itself a breach of the conditions of the sale, and I see, therefore, no reason why the assignment of it to him should be held to be invalid; it was, on the contrary, I think, a perfectly good and effectual conveyance of the timber, subject to the conditions upon which the sale of the land to Freckelton had been made.

If the patent had not yet been issued, for defendant to cut any of the kinds of timber and wood mentioned in the conditions of sale would be to contravene these conditions, and, it may be, would entitle the Crown to cancel the sale and forfeit the rights of the purchaser; but it is the Crown only that may do that, and, as far as appears, the Crown has not intervened and does not intend to do so, and the rights of plaintiff to the land have not been put in jeopardy by anything which defendant has done, nor would they be by anything which he proposed to do, with regard to the timber, and I can see no reason why plaintiff should be permitted to invoke the aid of the conditions of sale to prevent defendant from doing the very thing that Freckelton covenanted with defendant's assignor Jamieson Johnston that he should have the right to do.

Thus far I have dealt with the case on the assumption that plaintiff has no higher right as against defendant than Freckelton would have had, and that, I think, is the true position.

The testimony of Jamieson Johnston at the trial was that before plaintiff acquired his rights by the assignment from Freckelton to him, he (Jamieson Johnston) gave plaintiff distinct notice of the agreement as to the timber and of his rights under it. . . .

Upon the whole, it was, in my opinion, proved that plaintiff had actual notice of the agreement with Jamieson Johnston and of his rights as they were declared by the assignment from Freckelton to him. The testimony of Jamieson Johnston on this branch of the case is to be preferred to that of plaintiff, and if accepted puts this beyond question. . . .

Having come to these conclusions, it follows, I think, that the judgment appealed from is right and should be affirmed, for I entirely agree with my late learned brother Ferguson that—actual notice being proved—plaintiff cannot set up the registration of the assignment to him to defeat the prior assignment of the timber to Jamieson Johnston.

There is, in my opinion, no reason why the cases decided upon the Registry Acts should not apply to registration under the Indian Act. The purposes which the Acts are designed to serve are the same, and if in the one case the actual notice of an instrument is the equivalent of the registration of it, it should have the same effect in the other. . . .

Appeal dismissed with costs.

JULY 7TH, 1904.

DIVISIONAL COURT.

SCOTT v. TOWNSHIP OF ELLICE.

Public Schools—Collection of Rates—Protestant Separate School—School Building—By-law—Petition—Status of Plaintiff.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J. (2 O. W. R. 880), dismissing with costs an action brought for a declaration that it was the duty of defendant corporation to correct errors or omissions made in the collection of the rate imposed for public school purposes for 1902, and for a mandatory order upon defendant corporation to correct errors, and for a declaration that a by-law passed by defendant corporation to establish a "Protestant separate school" was illegal and invalid.

R. S. Robertson, Stratford, for plaintiff.

G. G. McPherson, K.C., for defendant corporation.

J. C. Makins, Stratford, for other defendants.

The judgment of the Court (MEREDITH, C.J., MACLAREN, J.A., MACMAHON, J.), was delivered by

MEREDITH, C.J.—The locus standi of plaintiff to impeach the proceedings which he was attacking depended upon his tenancy of part of lot 4 in the 3rd concession of Ellice, and the learned Chief Justice has found, on evidence which fully supports his finding, that plaintiff took his lease from the owner of the land on the understanding and agreement that the school taxes on it should go to the Protestant separate school, the formation and existence of which his main attack was directed against. We entirely agree with the Chief Justice that, under these circumstances, whatever might be the position of any other ratepayer, not so handicapped, the plaintiff is not entitled to the aid of the Court to obtain the declaration and other relief which he seeks.

Appeal dismissed with costs.

JULY 7TH, 1904.

DIVISIONAL COURT.

SASKATCHEWAN LAND AND HOMESTEAD CO. v.
LEADLEY.

SASKATCHEWAN LAND AND HOMESTEAD CO. v.
MOORE.

Company—Use of Name as Plaintiff in Actions—Application to Stay Actions—Meeting of Shareholders—Special Circumstances.

Appeals by plaintiffs from orders of FALCONBRIDGE, C.J., 3 O. W. R. 191, varying orders of Master in Chambers, 3 O. W. R. 133.

A. B. Cunningham, Kingston, for plaintiffs.

A. J. Russell Snow, for defendant Moore.

J. W. St. John, for defendants the Leadleys.

The judgment of the Court (MEREDITH, C.J., MACLAREN, J.A., MACMAHON, J.), was delivered by

MEREDITH, C.J.—It is unnecessary to decide whether, under ordinary circumstances, and if plaintiff company were a going concern, it would be proper to permit the shareholders at whose instance these actions have been brought to proceed with them in the name of the company.

One of the actions is brought to set aside in part a mortgage made by plaintiff company to one Leadley, and a transaction by which the whole of the assets of the company passed into the hands of a mortgagee, without the authority of the company, and as the result, as is alleged, of an arrangement brought about by one who occupied towards the company such a fiduciary position as, it is said, disentitled him to make a profit out of the transaction at the expense of the company, and who, as it is also alleged, by a secret agreement between him and the mortgagee, was to share in the profits of the arrangement.

The transactions which are impeached took place in 1900 and 1902, and since that time those who were then in control of the company's business have treated it as having been put an end to and the company as practically wound up.

No meeting of the directors of the company has been held, nor any annual meeting of the shareholders for the election of directors, for several years past; of those who were last elected directors several have ceased to be shareholders, and a sufficient number of directors to form a quorum for the transaction of business no longer exists, and there is, therefore, in all probability, no way of calling a general meeting of the shareholders except that of the shareholders exercising their statutory power of calling one.

The remnant of the board of directors has possession of the company's seal, and it is that remnant and defendant Moore who are seeking to prevent the use of the company's name.

A special general meeting of the company has been called by the shareholders, and it has been held. The regularity of the meeting and of the proceedings at it is attacked by those who have moved to strike out the name of the company as plaintiffs. It is urged by them that a number of persons who claim to be shareholders and who voted as such at the meeting, and whose votes were necessary to carry the resolution which was there passed to sanction the use of the company's name, are not shareholders, because the transfers to them of the shares which they claim to own have not, as it is said, been properly recorded in the books of the company, nor, as it is also said, do the names of these persons appear in the register of shareholders. It is manifest, I think, that a large majority, both in number and amount, of those who are registered shareholders or entitled to be entered on the register of shareholders, if they are not already entered on it, are desirous that these actions should proceed in the name of the company as plaintiffs, and under all the circumstances, and especially as those whose conduct of the affairs of the

company is impeached are the persons at whose instance the application to strike out the name of the company has been made, and the persons through whose neglect the names of the shareholders have not been entered in the register of shareholders—if their names are not entered there—the Court ought not, in my opinion, to interfere to prevent the use of the name of the company as plaintiffs.

Appeals allowed, and motions before Master dismissed. Costs here and below to be in the cause, unless the trial Judge otherwise orders.

JULY 8TH, 1904.

DIVISIONAL COURT.

LEE v. CULP.

*Sale of Goods—Destruction of Goods before Actual Delivery
—Property not Passing to Purchaser.*

Appeal by defendant from judgment of Judge of County Court of Lincoln awarding plaintiff \$200 as the value of certain apples alleged to have been bargained and sold by plaintiff to defendant. The following facts were undisputed. Plaintiff agreed to sell and defendant to buy all the apples in plaintiff's orchard of first and second quality—the apples then being on the trees—at \$1 per barrel for firsts and 75 cents per barrel for seconds; plaintiff to retain the culls; plaintiff to pick the apples and place them in piles in the orchard; defendant to furnish barrels and pack the apples; plaintiff to convey them to station where barrelled. Plaintiff did pick all the apples and placed them in 64 piles in the orchard, and notified defendant that they were ready for packing. This was about 1st November, 1903. No specific time was agreed upon when the apples should be packed or when payment should be made. Defendant was disappointed in securing barrels, and packed only twelve barrels of the apples. These were delivered to him. The others remained on the ground and were frozen and destroyed late in November. There was conflict of evidence as to whether anything was said, when the bargain was made, about protecting the apples against frost; and the Judge found as a fact that that matter was not imported into the bargain as a term thereof. He also found that defendant at no time said anything to plaintiff about lack of barrels, nor did he notify plaintiff before the apples were destroyed that he would not take them or that plaintiff might sell them to some one else; but on 17th November defendant sent his book-keeper to plaintiff to ask plaintiff to cover the apples thicker, and plaintiff

said he had not the straw, or it would take too much. On 24th November the same book-keeper asked plaintiff to get men and to put the apples in the cellar, but this was not done. The Judge held that the apples were selected and appropriated by plaintiff and approved of by defendants and that the property in the unpacked apples passed to defendant with all the risks of destruction before actual delivery.

W. E. Middleton, for defendant.

H. H. Collier, K.C., for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

TEETZEL, J.—The conclusion of the learned Judge below is not warranted. It does not appear by the evidence that anything was said as to who should select the apples and grade them into firsts, seconds, and culls, but it must be inferred from all the circumstances that defendant and his packers were to do this with the co-operation or concurrence at least of plaintiff, and it must also be assumed that payment was to be made on delivery of the apples when packed. There were two circumstances or conditions in the agreement between the parties which combined to defeat plaintiff's contention that the property in the apples passed to defendant, the fact that the sale was of a part only of a bulk quantity, and the fact that to determine the quantity, quality, and total price, defendant was to separate from the bulk and classify the goods to be taken by him, plaintiff retaining the culls; and in this work plaintiff was to co-operate or concur, and had the right to insist upon the selections being made in accordance with the recognized standards of quality.

[Reference to *Box v. Provincial Ins. Co.*, 15 Gr. 337, 18 Gr. 280; *White v. Wilkes*, 5 Taunt. 176; *Shepley v. Davis*, 5 Taunt. 617; *McDougall v. Elliott*, 20 U. C. R. 299; *Lingham v. Ecclestone*, 27 Mich. 324; *Hahn v. Fredericks*, 30 Mich. 233; *Blackburn's Contracts of Sale*, p. 124 et seq.; *Benjamin on Sale*, 7th Am. ed., p. 313 et seq.]

Before there can be a bargain and sale, as distinguished from an executory agreement, the parties must be agreed as to the specific goods on which the contract is to attach, and it makes no difference that the goods are so far ascertained that the parties have agreed that they shall be taken from some specified larger stock. The law gives effect to the intention of the parties in determining whether the property passes, but, in the absence of an unequivocal expression of intention by both parties that the property shall pass, it will not pass where the sale is of an unascertained part of a bulk

which has to be separated and classified by one party with the concurrence or co-operation of the other.

[Reference to *Ross v. Hannan*, 19 S. C. R. 227; *Wilson v. Shaver*, 3 O. L. R. 110; *Turley v. Bates*, 2 H. & C. 200.]

Appeal allowed and action dismissed except as to \$10 paid into Court by defendant, which should be paid out to plaintiff. No costs of action or appeal.

ANGLIN, J.

JULY 9TH, 1904.

CHAMBERS.

RE MITCHELL.

Will—Construction—Misnomer of Legatee—Intention—Legacy—Vested Interest—Condition Subsequent—Divesting—Death of Legatee—Foreign Domicil—Distribution of Legacy.

Motion by executors and trustees under will of Robert Mitchell for an order declaring construction of his will. The testator died on 5th March, 1886. By his will he provided an annuity for his widow, who lived until 20th March, 1904. Margaret Toms, a daughter, who survived the testator, died intestate in the State of New York, leaving a husband but no issue. The testator's son Thomas died childless on 29th May, 1893, leaving a will of which his widow is executrix. Mary Ann McMillan, Albert J. Mitchell, and Robert Mitchell were children still surviving, as were also Lucinda and Samuel Mitchell, who were only interested as heirs of Margaret Toms. The questions now arising affected only \$18,000 set apart to produce the widow's annuity, and arose under the following provisions of the will: (a) "And upon further trust to divide the remainder of my residuary estate (and also the corpus of said annuity after the death of my said wife and the said legacy to my said grandson if and when the same shall fall into my residuary estate) share and share alike among my children Margaret, Mary Ann, Thomas, and Albert J. Mitchell, with full discretion to my said trustees to make such division and pay over the same from time to time as they shall have converted or got in my said estates as hereinbefore directed." (b) "And in case any of my said children, Margaret, Mary Ann, Robert, and Albert J. Mitchell, shall die before the said residuary estate shall have been fully divided, leaving lawful issue him or her surviving, the said issue shall take the share or shares to which their respective parents would have been entitled if living."

J. B. Holden, for applicants.

W. R. Riddell, K.C., for administrators of estate of Margaret Toms.

D. C. Ross, for widow and executrix of Thomas Mitchell.

A. F. Lobb, for Samuel W. S. Toms.

W. H. Blake, K.C., for Albert J. Mitchell and others.

F. W. Harcourt, for Robert Mitchell.

ANGLIN, J.— . . . The word "Robert" in paragraph (b) should be read "Thomas," to correspond with paragraph (a). . . .

Paragraph (a) gives to the four named children a vested interest. The event upon which a divesting of the share of any of these beneficiaries would have occurred, viz., his or her death leaving issue, has not happened. The precise condition subsequent upon which divesting is to ensue must be fulfilled, and more contingency than is expressed must not be imported into a will: Kirby v. Bangs, 27 A. R. 17; Ryan v. Cooley, 15 A. R. 379; Re Gardner, 3 O. L. R. 343; Baldwin v. Rogers, 3 De G. M. & G. 649; Strother v. Dutton, 1 De G. & J. 675; Templeman v. Warrington, 13 Sim. 267. The shares of Margaret and Thomas pass therefore to their respective personal representatives.

Margaret Toms having died domiciled in the State of New York, her personal estate is to be administered according to the law of that State, under which, she dying intestate and without issue, her surviving husband is entitled to her estate as against her brothers and sisters.

Order declaring accordingly. Costs of all parties out of the respective estates.

ANGLIN, J.

JULY 9TH, 1904.

CHAMBERS.

DESERONTO IRON CO. v. RATHBUN CO. OF DESER-
ONTO.

*Indemnity—Appeal by Third Parties in Name of Defendants
—Security—Bond—Covenant—Form—Construction of
Order—Amount of Indemnity—Costs.*

The trial of this action resulted in a recovery by plaintiffs for about \$5,580 and costs, and in a judgment requiring the third parties to indemnify defendants against plaintiffs' claim for debt and costs and for defendants' own costs. From the latter part of this judgment the third parties lodged an appeal. By an order of MEREDITH, C.J., they were allowed to appeal in defendants' name against the judgment

in favour of plaintiffs, "upon giving to the defendants proper indemnity to be settled by one of the registrars of this Court."

The senior registrar settled as such indemnity a bond in the penal sum of \$400, conditioned to be void upon the third parties "effectually prosecuting such appeal in the name of the Rathbun Company and paying such costs of the appeal (if any) as shall be awarded to be paid by the said Rathbun Company, and in all other respects indemnifying and saving harmless the said Rathbun Company from all loss, costs, damages, or expenses, which the said Rathbun Company may incur or be put to by reason of the bringing or prosecution of this appeal." The third parties accepted this settlement of the form of the bond, and gave a bond accordingly, with the United States Fidelity and Guarantee Co. as sureties. The defendants appealed, contending that this bond was insufficient in form and in amount.

E. D. Armour, K.C., for defendants.

J. W. Bain, for the third parties.

ANGLIN, J.—Both parties stand upon the terms of the order of the learned Chief Justice as issued; the third parties maintaining that indemnity against the costs of the proposed appeal only was intended to be ordered, and that the bond is sufficient in form and amount for that purpose; the defendants contending that indemnity against the entire claim of the plaintiffs is what the order imposes as the condition of an appeal being taken in their name, or, if not, indemnity against any possible increase in the present judgment of the plaintiffs upon such appeal. In any case they say that \$400 is not a sufficient sum to properly indemnify them against costs which the plaintiffs may recover upon such appeal over and above the sum of \$200 paid into Court by the third parties as security to the plaintiffs.

It is obvious that a little more foresight upon the settlement of the order of the learned Chief Justice would have resulted in its terms being more explicit, and the present difficulty would have been avoided. As it is, I confess that its meaning and the scope of the indemnity which it directs is open to much doubt. Were I at liberty to inquire from Meredith, C.J., what he really intended to order, the difficulty would probably entirely disappear. I am obliged, however, to construe the order as it is drawn up, and from its language to gather, as best I can, its true meaning and effect, if I am now to determine the form and the amount of the penal

sum of any bond to be taken as a compliance with its requirements. The amount of the penalty fixed by the learned senior registrar rather indicates that he has upheld the contention of the third parties.

The difficulties which the defendants' counsel anticipates may never in fact arise. The judgment against his clients may be set aside or reduced in amount upon the proposed appeal. The judgment against the third parties may prove perfectly good as an indemnity *pro tanto* to the defendants. Were I now to determine the extent and the scope of the indemnity to which this order entitles defendants, I should dispose—possibly to the serious prejudice of one of these parties—of questions with which it seems premature and unnecessary at present to grapple. Without, therefore, holding that the registrar's interpretation of the order of the learned Chief Justice is erroneous, in my opinion the better course will be for that officer, instead of a bond with a fixed penal sum, to settle a joint covenant, in the terms of the condition (*mutatis mutandis*) in the bond now filed as settled by him, to be entered into by the third parties and their sureties with the defendants. This covenant should be preceded by appropriate recitals indicating that it is intended to give to the defendants such indemnity as the order under which it is entered into contemplates their receiving. The third parties have already accepted the substance of this covenant by acquiescing in the form of the bond as settled. If such a covenant is not satisfactory to the defendants, and they prefer to retain the form of security by bond, the amount of the present bond should, in my opinion, be increased to the sum of \$1,000 to cover extra costs for which the proposed appeal may render the defendants liable, and interest on the judgment which will accrue through the delay entailed by such appeal. The costs of this application should be paid by the third parties to the defendants. The present bond may be removed from the files of the Court. As required by the defendants, the new security, whether in the form of bond or covenant, will be accompanied by an affidavit of execution by the third parties and their sureties, and will be filed or delivered to the defendants as they may elect. The defendants should elect whether they will take a covenant or a bond as above indicated, within one week.

MEREDITH, J.

JULY 9TH, 1904.

TRIAL.

CITY OF HAMILTON v. HAMILTON STREET R. W.
CO.

Street Railways—Agreement with Municipality—Payment of Percentage of “Gross Receipts”—Powers of Company and of Municipal Corporation—Passenger Fares outside Municipality—Unearned Profits.

Action upon a covenant contained in an agreement, under seal, made between the parties to this action, and dated the 26th March, 1892, whereby defendants agreed to pay to plaintiffs a certain proportion of defendants’ “gross receipts.”

F. Mackelcan, K.C., for plaintiffs.

E. D. Armour, K.C., and G. H. Levy, Hamilton, for defendants.

MEREDITH, J.—Two objections, now requiring consideration, are made to this claim: first, that the covenant was one beyond the power of the parties, or of one of them, to make; and second, that it does not include the moneys in question.

The express and direct legislative authority, of the parties, upon the subject, is contained in the 7th and 15th sections of the defendants’ Act of incorporation—36 Vict. ch. 100 (O.)—sec. 7 providing that the defendants might construct and operate a railway upon and along streets and highways within the jurisdiction of the plaintiffs, and of any of the adjoining municipalities, under and subject to any agreement to be made between the council of the plaintiffs, and of the said municipalities respectively, and the defendants, and under and subject to any by-laws of the plaintiffs and municipalities respectively, or any of them, made in pursuance thereof; and sec. 15 giving both parties authority to contract in respect of certain specified subjects, none of which seems to include such a covenant as that in question.

If the first question for consideration had arisen soon after the passing of the Act, there would have been very much to be said in support of the defendants’ contention; it might have been found a difficult thing to discover any legal power in the plaintiffs to exact or take for their own use and

benefit a share in the profits, earnings, or receipts of the defendants.

The words "any agreement" contained in sec. 7 must mean any agreement within the corporate capacities of the parties: being both entirely creations of the statute law, endowed with legal existence for certain limited purposes only, their powers must be found in enactments conferring them, including of course the Act in question. Even if not controlled, as they may be, by sec. 15, the words "any agreement" could not include—for one plain instance—a co-partnership agreement for the construction and working of the railway and sharing in the profits and losses of the undertaking.

The highways within a municipality are vested in the corporation thereof, at least largely, to enable them to perform their duties to the public in respect of such ways—mainly to keep them in repair. In days when tolls are commonly called "a relic of barbarism," the purpose of the Legislature could hardly have been to confer on municipalities power to exact a great toll with liberty to apply it at their will; if the imposition of a toll were comprehended, it may well be thought that it would have been accompanied by a provision that the corporation should expend it upon the highways or otherwise in ease of those using them. It is against equity for a trustee to make a profit of his office. It seems against justice that a corporation should be permitted to exact a tax for the use of the highways and to expend it in paying debts incurred by them wholly disconnected from such ways—to use the means thus obtained in filling holes in their financial ways, instead of in the highways, or otherwise in ease of those who have the highest rights in them. The supreme rights in highways are the rights of traffic over them; the rights of all His Majesty's liege subjects to pass and repass over them.

Neither sec. 15 of the enactment in question, nor the general enactments now in force respecting street and electric railways, lend any great encouragement to the exercise of the power in question. In the latter the burden put on the company is applied in ease of the passenger. Nor indeed is there much of such encouragement in the earlier general enactments. Ease of the public in better roads, cheaper fares, and better accommodation, strike one as, generally speaking, the most just way of sharing in the receipts, earnings, or profits of such

companies. The blame for ill kept highways, high fares, and wretched accommodation upon street railways may rest upon the municipalities, if they exact excessive amounts and expend the money for ulterior purposes.

But upwards of twelve years ago the parties, with great deliberation, entered into this agreement, expressly made under and pursuant to the powers conferred upon them in and by the legislation in question, in which agreement payment to the plaintiffs of proportions of the gross receipts of the defendants is very clearly provided for, and the defendants have, up to the present time, regularly made quarterly payments thereof in accordance with the terms of the agreement; and the very agreement has, in a measure at least, been recognized by the Legislature, in a subsequent Act respecting the defendants, passed at their instance and upon their petition, in which the whole of the agreement and of the by-law referred to in it and based upon it are set out; 56 Vict. ch. 90 (O.): and under other similar Acts of incorporation other like agreements have been made and have been recognized and given effect to by legislation. So that we have an interpretation put upon the enactment by the defendants themselves, and by the Legislature, contrary to that now contended for by the defendants. It is therefore quite too late to give effect to this defence, and unnecessary to consider the questions whether by estoppel merely the defendants should fail; and what the effect of their succeeding would be—whether to avoid the whole agreement, or merely to relieve them from an obligation without which, or a valid equivalent for it, no contract between the parties would probably ever have been made.

The second defence covers two quite distinct questions, though each depends entirely upon the meaning of the words "gross receipts" used in the agreement in question. Under that agreement the plaintiffs are entitled to a "percentage" of the defendants' "gross receipts," and the first question is: Does that term include fares paid by passengers without the corporate territorial limits of the defendants, who also began their journey upon the defendants' railway beyond such limits?

The words "gross receipts" are, in their ordinary full meaning, very comprehensive, no doubt designedly so, to leave no room for disputations and cunning devices to which the use of the word "profits" or the word "earnings" might give encouragement. But plainly the words were not meant

to have so full a meaning, were not meant to include every sum of money received by the defendants, and which in the ordinary course of book-keeping would go to the debit side of their accounts, under the heading of "receipts." For one or two examples, to make this plainer, the moneys received from the sale of bonds, authorized by the Act of 1893, though obviously part of their gross receipts of money, quite as clearly are not part of the "gross receipts" in which the plaintiffs are entitled to share; so, too, gifts from any of the adjoining municipalities, or from any person, to induce the defendants to construct and operate a railway in such municipalities, are clearly part of the defendants' "gross receipts," but as clearly are not comprehended in the agreement. So that a line has to be drawn, a division made, somewhere in all that can come under the word receipts. The plaintiffs doubtless rejected the words "traffic receipts" and "earnings" as well as "profits" for the reasons before mentioned, though the word "earnings" would have been a more certain word and is often used in such a case; the words "gross receipts" are however used in the present general enactments before referred to.

Again, it can hardly be that, if the defendants had constructed or should construct one or more quite separate railways in the adjoining municipalities, the receipts, of any kind, from them would be required to pay toll to the plaintiffs—would be within the meaning of the words in question. Reading the agreement in the light of the surrounding circumstances—putting oneself, as nearly as possible, in the position of these parties at the time of making of the contract, it seems to me reasonably clear that the somewhat ambiguous words "gross receipts" include and were intended to include at least all traffic receipts in connection with the defendants' railway system operated in the city of Hamilton, and that the short extensions of the railway beyond the city limits are really a part of that system as much as if the objective points of such extensions had happened to have been within instead of without the city. The extensions were made for the use of the occupants of the city, and for the money to be made out of them. Neither the mere fact that other than city passengers may sometimes use the extensions as part of the city system, nor the possibility that a passenger may by chance begin and end his journey without the city, can make any difference. The extensions are yet in no sense part of a system, either separate from or connected with the city system, of any of the adjoining municipalities, but are in all essentials part of the city railway.

The plaintiffs therefore are entitled to their proportion of the gross receipts of the extensions as well as of the rest of the railway as constructed and operated at present. It is satisfactory to know that this construction of the agreement is in accord with that put upon it, without doubt or question, immediately after the making of it, by the parties themselves, and under which for several years payment has been made voluntarily by the defendants; and also that it is in accord with the contract between the defendants and the adjoining municipality into which the railway has been extended; that agreement contains no covenant to pay any part of the receipts of the defendants to the corporation of that municipality, presumably because the defendants are already under obligation to pay a "percentage" of them to the plaintiffs; so that it is in no sense a case of a double tax upon any part of the defendants' receipts.

The last question is whether the words "gross receipts" include traffic receipts not yet earned, such as receipts from the sale of passengers' tickets still outstanding.

The defendants' contention that moneys thus received are not to be included cannot be given effect to. It would reduce the wide term "gross receipts" to the very much narrower one "earnings for which value has been actually given," and would exclude even proof of the profits, for instance, from tickets sold and lost, or in regard to which for any other reason no value happens ever to be actually given, and tend much to defeat the purposes of the use of the widest term, as well as reduce to some extent the plaintiffs' share in the receipts. All moneys thus received must be part of the defendants' gross receipts, entered as receipts in their books, and used as such in their business; they are in no sense impressed with any kind of trust, but are plainly part of the "gross receipts" of the defendants in which the plaintiffs are entitled to share.

As in the case of wills, each case of this kind generally differs so much in some material circumstance from any other, that great care must be exercised in seeking assistance from the decisions; and this is especially so in regard to those in any of the Courts of any of the United States of America; the statute law, the municipal laws, in the narrower sense, and the terms of the agreements, as well as other material circumstances, are often so different that it is quite dangerous to apply them without the closest scrutiny of every material matter or circumstance. So that, although much

assistance is afforded in a general way by the many English and Canadian cases cited at the trial, as well as from some of the United States cases collected in the article upon Street Railways contained in the 2nd edition of the American and English Encyc. of Law, especially those referred to on p. 22 of vol. 27, and *Corn v. United States Express Co.*, 157 Penn. St. 579, I have found none which quite governs this case. In the Montreal case, for instance, although at first sight so much like this case, there are really many important differences; indeed, many things which seem to have more or less moved Girouard, J., to the opinion expressed by him, are clearly wanting in this case: I shall mention but two out of many differences, of more or less moment, between the cases; there the covenant was limited expressly to gross earnings from "its said railways;" here there is not that limitation, but the covenant is to pay "on their gross receipts" without any expressed limitation; and there at the time of the making of the contract the railway extended beyond the city limits; here it was not so; everywhere the agreement provided for a railway within the city wherever locality was mentioned.

There will be judgment for the plaintiffs upon all points, and the counterclaim will be dismissed, both with costs. If the parties cannot agree as to the amount, that will be ascertained by the proper local officer and inserted in the judgment.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING JULY 16TH, 1904.)

VOL. IV.

TORONTO, JULY 21, 1904.

No. 2

TEETZEL, J.

JULY 9TH, 1904.

CHAMBERS.

RE WILLIAMS v. BRIDGMAN.

County Court—Jurisdiction—Attachment of Debts—Assignment of Moneys Due to Judgment Debtor by Garnishee—Assignee as Claimant—Issue Directed—Amount Involved—Claim for Equitable Relief—Prohibition—Transfer to High Court.

Motion by claimant for prohibition against further proceedings in a garnishee matter pending in the County Court of Elgin under an order of the junior Judge of that Court.

The plaintiff had an unsatisfied judgment against defendant for \$315, obtained in the County Court; and the defendant held a judgment for \$420, upon which it was admitted that there was owing at the time of the attachment \$270 beyond what was sufficient to satisfy solicitors' liens.

The judgment creditor caused an attaching order to be issued on the garnishee, and upon the return of the order one Clary appeared as claimant under an alleged transfer from the judgment debtor.

The judgment creditor desiring to contest this claim, an order was made by the Judge directing an issue in which "the question to be tried shall be whether the money owing by the garnishee was, at the time of the service on the said garnishee of the garnishee order herein on the 19th day of April, 1904, attachable by the above named judgment creditor as against the claim of the said claimant as set forth in his affidavit above named."

Against this order the motion for prohibition was made by the claimant, who also asked in the alternative that the issue should be transferred to the High Court of Justice.

W. M. Boulton, for claimant, contended that, as the contest between the judgment creditor and the claimant involved the determination of the validity of the assignment of these moneys as against the judgment creditor, the proceeding was in the nature of an action for equitable relief, and the amount involved being over \$200, the County Court had no jurisdiction to try the issue, the jurisdiction of the County Court in actions for equitable relief being limited to \$200.

W. J. Tremear, for judgment creditor.

TEETZEL, J.—Rule 912 provides that “the garnishee shall be deemed indebted, although the debt sought to be attached has been assigned, charged, or incumbered by the judgment debtor, if the assignment, charge, or incumbrance is fraudulent as against creditors, or is otherwise impeachable by them.”

In the affidavit of the judgment creditor's solicitor filed on the motion for attachment, he states his belief that the assignment to the claimant is void as a fraud on creditors, also that no consideration was given for same.

The existence of a formal assignment is not disputed; and it is admitted that the amount of the garnishee's indebtedness which would be recoverable under the attachment but for the assignment, exceeds \$200.

The issue was directed under Rule 920, under which the Judge may, after hearing the parties, order payment of the amount due from the garnishee, or may order an issue or question to be tried, and may bar the claim of the third party, or make such other order with respect thereto as may seem just.

In this case the learned Judge exercised his discretion by directing an issue to be tried. This Rule is in aid of the preceding Rules providing for method of attachment of debts by a judgment creditor. No provision is made for directing the trial of an issue in the High Court in the case of a County Court attachment; and, in the absence of authority to the contrary, I think the meaning of the Rule is that the method thereby provided for determining the question whether a certain debt is attachable, notwithstanding that a claim is made to it by a third party, must be adopted in the County Court in all cases where the attachment is under a County Court judgment, notwithstanding that the amount which may be recovered by such attachment exceeds \$200.

The judgment creditor is pursuing her legal rights under a judgment in the County Court, which happens to be for

more than \$200, and, if the claimant is right in his contention, she would have to abandon all excess over that sum in order to have an issue tried in that Court, which involves determining whether the claim set up by the claimant is legal and binding upon the moneys attached, and in the end it may be found that such claim has no foundation in law.

No qualification of or exception to the general jurisdiction conferred by Rule 920 is provided for, and it must therefore have been intended that in all cases of County Court attachments the County Judge would be empowered to determine whether a debt was attachable to the extent of satisfying the judgment, whether it exceeded \$200 or not.

Being of opinion therefore that the County Court has jurisdiction to try this issue, and there appearing to be no good reason for transferring it to the High Court, the motion must be dismissed with costs.

JULY 9TH, 1904.

DIVISIONAL COURT.

SMITH v. CLARKSON.

Staying Proceedings—Action Trivial or Frivolous—Account—Previous Accounting before Surrogate Judge—Mala Fides—Insolvency of Plaintiff—Security for costs.

Appeal by plaintiff from order of ANGLIN, J., ante 593, staying the action unless the plaintiff should give security for costs.

F. E. Hodgins, K.C., for appellant.

W. E. Middleton, for defendant.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

MEREDITH, C.J.—It is clear that the Court has inherent jurisdiction to dismiss an action which is absolutely groundless.

The accounts which plaintiff brings his action to have taken have already been approved by the Judge in the proper Surrogate Court, and no ground whatever is suggested upon which they can be impeached, neither fraud nor mistake being shewn, and the accounts as so approved would be binding upon plaintiff in this action.

It was urged by Mr. Hodgins that the Surrogate Judge had no jurisdiction upon an appointment to pass the accounts to fix the trustee's remuneration, but with that we do not

agree. The passing of the accounts necessarily involved the consideration of the items by which the trustee claimed to discharge himself, and therefore the sum to be retained by him as compensation for his services; but, even if that were not so, the appointment was in fact for the purpose of fixing the remuneration as well as of passing the accounts.

It is clear also that plaintiff has not any substantial interest in the litigation. Technically he has an interest, because the amount of his liabilities would be decreased by the amount which, if he should succeed, would be struck off the allowance which had been made to the trustee; but the reduction would, in any case, be very small.

It is apparent also that the action is brought not for the bona fide purpose of having the accounts taken in the High Court, but in order to force the trustee to pay a claim which plaintiff makes against him, the liability for which the trustee disputes.

The result of the litigation, too, if unsuccessful, would be to take from the creditors part of the fund which is now available for the payment of their claims, for the trustee would be entitled to be indemnified out of the trust estate for his costs. . . .

While the power of the Court to stay an action in limine, on the ground that it is an abuse of the process, ought doubtless to be exercised only in a clear case, I am of opinion that, in the circumstances of this case, my brother Anglin's order was rightly made.

Appeal dismissed with costs.

BRITTON, J.

JULY 11TH, 1904.

CHAMBERS.

RE ENTERPRISE HOSIERY CO.

Company—Winding-up—Second Petition—Duty of Second Petitioner to Inform Court of First—Order—Conduct of Proceedings—Costs.

On 6th June, 1904, the Homer P. Snyder Manufacturing Co. of Little Falls, New York, filed a petition for an order for the winding-up of the above company under the Dominion statute. Notice of presentation was given for 17th June, 1904.

On 13th June Minnie Boucher, a creditor of the company, filed a petition for the same purpose, and on the same day counsel for this petitioner and for the company appeared before BRITTON, J., and an order was made on consent for

the winding-up of the company, counsel for the company waiving the 4 days' notice required by the Act. No intimation was made to the Judge that another petition was pending. The issue of the order so made was stayed, and the petition of the Snyder Co. came before BRITTON, J., on notice to Boucher and the company.

W. G. Thurston, for the Snyder Co.

W. M. Douglas, K.C., and W. A. Sadler, for Boucher.

W. H. Blake, K.C., and W. A. McMaster, for the company.

BRITTON, J.—It was frankly stated and stoutly contended that the insolvent company had the right to prefer liquidation by a friendly creditor, and that there was no duty or obligation on the part of the company or of the second petitioning creditor to inform the Judge of any pending prior petition or proceedings. I do not attempt to formulate any general rule to govern in such matters, but content myself with saying that the Judge should be informed of any such prior proceedings, and that an attempt to forestall a bona fide application by a friendly one—which sometimes might be a collusive one—is not, in my opinion, a practice that should be encouraged.

The Chancellor in *Re Alpha Oil Co.*, 12 P. R. 298, says it is advisable to follow the rules for guidance to be found in English cases. I follow in this case, so far as applicable, *Ex p. Mason, In re White*, 14 Ch. D. 71.

A creditor presenting a winding-up petition, with notice that another creditor has already presented a petition with the same object, does so at his own risk as to costs, and must prove not merely that he had reason to suspect that the first was not bona fide, but that mala fides or collusion actually exists: *Re Building Societies Trusts*, 44 Ch. D. 140. . . .

Winding-up order made; the Snyder Co. to have the order and the conduct of the proceedings, and to get the costs of their petition and proceedings and of the order.

The present case is somewhat different from the usual one in this respect, that the material supplied before me by the petitioning creditor Boucher was used, and in the result avoided the necessity of the first creditor proceeding further with the proposed examination of witnesses, and I therefore order that the costs of her petition down to the hearing before me be paid out of the estate of the Enterprise Hosiery Co.

MACMAHON, J.

JULY 11TH, 1904.

WEEKLY COURT.

GRATTAN v. OTTAWA ROMAN CATHOLIC SEPARATE SCHOOL TRUSTEES.

Schools—Separate Schools—Qualification of Teachers—Religious Community—Contract with—Invalidity—Residence of Teacher—Payments for Furnishing—Duration of Contract—Erection of School House.

Motion by plaintiff for judgment in action for an injunction to restrain defendants from entering into a contract with the Brothers of the Christian Schools for the direction of a boys' separate school for the parish of Notre Dame in the city of Ottawa, and from constructing a school building such as proposed by the contract.

Plaintiff was the owner of property in the city of Ottawa, and was assessed as a separate school supporter, and in his affidavit stated that the Order of the Brothers of the Christian Schools, who were proposed as teachers, did not possess certificates of qualification as prescribed by the regulations of the Education Department of the Province of Ontario.

On 19th May a resolution was passed by the separate school board that from and after 1st September then next the services of the Christian Brothers be secured as teachers of the boys' school on Murray street, and that a new school be erected at a cost of \$20,000.

The contract contained the following provisions: (1) The residence of the community shall be suitable to the common life followed by the Brothers, and shall contain the various apartments necessary for a religious institution, etc. (2) Water, fuel, and light to be furnished for the establishment; the premises to be in keeping with the number of Brothers who there reside. (3) The director's salary to be \$300, that of the other Brothers, 13 in number, \$250 each. The janitor to be at the expense of the school board. (6) The trustees are to pay for each Brother, independently of salary, once for all, \$100 for house furnishing; the Brothers to acquire the said furniture a fifth per year, and consequently at the expiration of 5 years, they will remain indisputable proprietors of said furniture. (7) Should it happen that the trustees would not require the Brothers of the Christian Schools, or that the latter should decide to withdraw from the school, notice should be given in each case, by writing, before 1st January of the scholastic year, but the said contract to cease with the scholastic year. (8) The Brothers of the Christian

Schools are to give by 1st September the necessary Brothers for 12 classes, that is, 14. (9) A Brother of the English language to form part of staff, to be employed in teaching said language in the school, when the thing becomes possible. (12) The Brothers are to live in community according to their rules, and under the direction of their Superior. (15) The present contract is made for a period of 10 years, but the cancelling may be effected from year to year by either parties in giving the above mentioned notice.

It was not contended that the Brothers of the Christian Schools possessed certificates of qualification as prescribed by the regulations of the Education Department, but it was shewn by the affidavit of a member of the community that they had been established in the Province of Quebec since 1837 and in the city of Ottawa since 1864. By sec. 36 of the Separate Schools Act, R. S. O. ch. 294, "the teachers of a separate school shall be subject to the same examination and receive their certificates of qualification in the same manner as public school teachers generally; but the persons qualified by law as teachers, either in the Province of Ontario or at the time of the passing of the British North America Act, 1867, in the Province of Quebec, shall be considered qualified teachers for the purposes of this Act.

G. F. Henderson, Ottawa, for plaintiff.

N. A. Belcourt, K.C., for defendants.

MACMAHON, J.—The latter part of sec. 36 is an addition made in 1886 to sec. 30 of R. S. O. 1877 ch. 206, and is an enabling enactment solely for the benefit of those who in 1867 were qualified teachers under the law as it then existed, either in Ontario or Quebec. And no person who after the year 1867 became qualified as a teacher in the Province of Quebec is qualified to teach in Ontario without passing the examinations and obtaining the certificate required by sec. 78 of the Act. The contract proposed to be entered into is, therefore, invalid. The duties of the board of trustees are defined by sec. 33. No authority is conferred upon the board to expend the money of the supporters of the schools in providing a residence for the teacher or teachers or for a chapel, common room for studies, or for cells, infirmary, dormitory, etc., as set out in clause 1 of the contract.

The only authority conferred on trustees to implement the salary of a teacher is by sec. 34, and it gives the trustees no power to expend school moneys in the erection of a residence for the teacher.

There is no authority in the trustees to make the expenditure provided for in clause 6.

Boards of trustees are not authorized to enter into a contract with any teacher beyond the period of one year, and clause 15 is therefore invalid.

Judgment for plaintiff with costs declaring the whole agreement invalid and restraining defendants from entering into it.

TEETZEL, J.

JULY 11TH, 1904.

TRIAL.

VALIQUETTE v. FRASER.

Negligence—Injury to Person—Falling of Wall of Building—Exceptional Storm—Defective Construction—Knowledge of Owner—Employment of Competent Superintendent.

Action by the widow and children of J. S. Valiquette for damages occasioned by his death while employed in the boiler house of defendants Fraser, engaged in putting in machinery for one Campbell, his employer, under a contract which Campbell had with the Frasers. The action was brought against the Frasers and one Garrock, a contractor who did the brickwork in the erection of the boiler house. While Valiquette was at work in the boiler house, the end fell in, causing his death.

Plaintiffs alleged negligence against both defendants. The charge against defendants Fraser was that the boiler house was built without proper plans and without precautions to ensure that the walls were safe and proper. As against Garrock plaintiffs alleged that he was guilty of negligence in using bad mortar, etc.

During the course of the trial the Judge dispensed with the jury.

J. Lorn McDougall, Ottawa, and E. J. Daly, Ottawa, for plaintiffs.

A. B. Aylesworth, K.C., and J. Christie, Ottawa, for defendants the Frasers.

B. B. Matheson, Ottawa, for defendant Garrock.

TEETZEL, J.—Defendants did not employ an architect to prepare plans and specifications for the building, but adopted the plans and specifications which had been prepared by Allis, Chalmers, & Co., of Chicago, a well known firm of architects and contractors, who had prepared plans and specifications for the St. Anthony Lumber Company at Whitney. . . .

The Frasers arranged with that company to have their plans and specifications copied, and for the purpose of obtaining the copies and to obtain tenders and superintend the construction, they employed a Mr. Proper, who, though not a professional architect, had had very extensive experience in mill construction work. Some variations were made by Mr. Proper in these plans. . . .

The plans for the roof were prepared by the Dominion Bridge Company, who under contract constructed and put on the roof.

The brickwork was done under contract by defendant Garrock, who commenced his work early in March, 1903, and . . . a portion of his work was done during frosty weather.

The building was completed with the exception of putting in some interior machinery, in which the deceased was engaged under his employer Campbell on 6th August, 1903, when suddenly the end wall of the boiler house gave way and fell into the building, inflicting injuries to deceased which caused his death the next day.

According to the evidence, a very severe gale of wind was blowing when the wall fell in . . . and defendants contended that it was the suddenness and violence of the storm that caused the accident, and that they could not, by the exercise of the utmost care, foresee and provide against the irresistible force of the storm. . . .

The end of the power house was near the edge of a lake, and faced a stretch of 2 or 3 miles of open water, and I think, while defendants could not be expected to provide against storms of the violence of a cyclone or tornado, that it was reasonable to expect from the location and position of the boiler house that it would be subjected to more than ordinary wind strain at times. . . .

I do not think the storm was greater or more violent than a properly constructed wall should have withstood.

There was great conflict of evidence between the experts called by plaintiffs and those called by defendants. . . .

I am of opinion that it was not unreasonable for defendants to adopt the plans and specifications which had been used in the construction of the building at Whitney, and also it was not unreasonable for them to employ Mr. Proper, although not an architect, to take charge of the construction; but I am also of opinion that in fact the wall was not sufficient to withstand the wind pressure that might reasonably be expected in that locality. . . .

Notwithstanding my conclusions of fact, I am unable to find that defendants were guilty of such negligence as to render them liable to plaintiffs.

It seems to me quite clear that defendant Garrock is not responsible; for, while it is a fact that some of his work was done during frosty weather, and on that account the adhesive qualities of the mortar were unavoidably affected to some extent, I am of opinion that the brickwork, having regard to the season of the year in which he performed his contract, was reasonably sufficient, and that he was not guilty of any negligence in performing his work.

There was no evidence whatever pointing to any personal knowledge upon the part of the other defendants as to any weakness of the wall, and in adopting the plans upon which the Whitney boiler house had been built, and in employing a man—though not a professional architect—of high reputation as an experienced superintendent of construction, and in placing their contracts with contractors of repute, defendants did all that reasonably prudent men might be expected to do.

If there was any error, it was one of judgment on the part of Mr. Proper, and, in face of the fact that a number of architects of high standing, testified their indorsement of all that was done by him, and their approval of the plans, I do not think I can attribute to defendants that want of ordinary care in constructing their building which would make them liable in damages to plaintiffs. The efficiency of the design was a matter upon which opinions might honestly differ, and their adoption therefore was not negligence in Proper.

I do not think it follows as a matter of law that, because as a fact the wall was not sufficient for the purpose for which it was intended, defendants are liable, unless it appears that defendants themselves knew or ought to have known of the defect, or employed an incompetent superintendent or one who was guilty of negligence.

Defendants are not liable to plaintiffs as insurers. I do not think the insufficiency of the designs or of the wall was so manifest that it could have been detected by any ordinary inspection; in fact, honest differences of opinion might very well occur between architects as to the sufficiency, as was shewn by the variety of testimony at the trial; and no obligation is to be implied by law that a building is absolutely safe: see *Searle v. Laverick*, L. R. 9 Q. B. 122.

I also refer to *Black v. Ontario Wheel Co.*, 19 O. R. 578; *Pollock on Torts*, 6th ed., p. 489; *Thompson on Negligence*, secs. 1058, 1059; *Marney v. Scott*, [1899] 1 Q. B. 986; *Carter v. Metropolitan Co.*, L. R. 1 C. P. 300; *Broggi v. Robins*, 15 Times L. R. 224; *Louisville v. Allen*, 78 Ala. 494; *Pilcher v. Lemon*, 12 N. Y. App. 356; *Lane v. Cox*, [1897] 1 Q. B. 415.

Action dismissed without costs.

BRITTON, J.

JULY 11TH, 1904.

TRIAL.

TRIMBLE v. LAIRD.

Sale of Goods—Lien for Balance of Purchase Money—Informal Document Creating Equitable Lien—Notice to Purchaser—Notice to Chattel Mortgagee—Solicitor—Knowledge.

Action to recover from defendant Laird the balance due upon the price of a portable saw-mill plant sold by plaintiff to Laird and to establish and enforce as against defendants Bedford and Sale a lien upon the plant for such balance.

A. H. Clarke, K.C., for plaintiff.

J. P. Mabey, K.C., for defendant Sale.

J. L. Murphy, Windsor, for defendant Bedford.

BRITTON, J.—On 2nd September, 1899 . . . plaintiff agreed to sell to defendant Laird the portable saw-mill plant for \$500, payable \$150 in cash and by two notes of \$175 each at one and two years . . . Defendant Sale (a solicitor) personally acted for the parties in having the bill of sale and promissory notes drawn, and he paid to plaintiff . . . the \$150 cash. There is nothing in the bill of sale about the property not passing till paid for, or about any vendor's lien, or security of any kind, but there was written upon each note, by defendant Sale, at his suggestion, . . . words importing that plaintiff held a lien upon the property sold for the amount of the unpaid purchase money. . . . The notes themselves are lost.

On 5th October, 1899, defendant Laird gave defendant Sale, as trustee, not having any cestui que trust, a chattel mortgage on the property bought from plaintiff, together with other property, for securing \$3,000 said to have been advanced to Laird.

On 2nd June, 1900, defendant Laird sold his . . . Duck Island property, including the mill plant purchased from plaintiff, to defendant Bedford. Defendant Sale was a party to the agreement between Laird and Bedford. . . .

On 5th June, 1900, defendant Bedford executed to defendant Sale a chattel mortgage for \$5,279.13 on all the property Bedford got from Laird, including the mill plant. . . .

I find that, at the time of the sale by plaintiff to defendant Laird of this mill property, there was an agreement between plaintiff and defendant Laird, fully understood by defendant

Sale, to whom was left the carrying it out, that there should be a lien in favour of plaintiff upon the property he was selling to Laird for the unpaid purchase money represented by the two notes for \$175 each.

I find that defendant Bedford, in purchasing from Laird the property, including what was purchased from plaintiff, assumed as a liability which, as between Bedford and Laird, Bedford was to pay, the unpaid balance to plaintiff, but Bedford was not called as a witness, and there is nothing in the evidence to shew that Bedford at the time of his purchase had any notice or knowledge of plaintiff's lien. . . .

This case seems to me somewhat different from that of a mortgagee under an unregistered mortgage—or a mortgage in which chattels are insufficiently described, as against a subsequent purchaser or mortgagee with notice . . . See *Tidey v. Craib*, 4 O. R. 696; *Moffatt v. Coulson*, 19 U. C. R. 341.

This case is also very different from that of a vendor under special agreement that title to property is not to pass to purchaser until fully paid for.

The writing upon the notes, although not signed and not incorporated in the instrument itself, shews an intention of the parties to charge the particular property sold with the payment of the notes. The property is sufficiently identified with the debt, and I am of opinion that as against Laird plaintiff was entitled to an equitable lien upon the property.

If in law it can be avoided, Sale should not be allowed to be heard objecting to the lien. The principle involved in the decision in *Blackley v. Kenny*, 16 A. R. 522, should, if possible, be applied.

But there was the sale to Bedford, and, so far as appears, without notice of the lien. This is not a question of liability upon the notes, but of property, of remedy in rem, and I cannot say that plaintiff could have followed the property in Bedford's hands. Although Sale acted in the transfer between Laird and Bedford, he did not act as Bedford's solicitor so that Bedford would be affected by Sale's knowledge of the lien. Bedford is still the owner of the property subject to the mortgage. His interest may be—possibly is—valueless, but legally Sale is entitled to stand upon Bedford's title. . . . It seems, looking at it apart from the dry legal question, inequitable to permit Sale, even as trustee, to hold this property apart from plaintiff's supposed lien, but I fear it cannot be prevented. . . .

Upon the whole case I must decide in favour of defendants Bedford and Sale as to assertion of lien. Action as to them dismissed but without costs.

Judgment for plaintiffs against defendant Laird for amount of claim.

JULY 11TH, 1904.

DIVISIONAL COURT.

COULTER v. COULTER.

Limitation of Actions — Real Property Limitation Act — Character of Possession — Occupation of House as Part Compensation for Services.

Appeal by defendant from judgment of BRITTON, J., at the trial, in favour of plaintiffs, trustees under the will of James Coulter, father of defendant, in an action to recover possession of a house and about 3-5 of an acre of land in the village of Weston.

The defence was that defendant had acquired title by virtue of the Real Property Limitation Act.

G. H. Watson, K.C., for defendant.

A. F. Lobb, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

TEETZEL, J.—Defendant has been in continuous occupation of the house since February, 1884, and has during these years cultivated the adjoining land, in varying quantities, for garden purposes. . . .

The trial Judge held that defendant had entered into possession of the house not as tenant, but as servant, of his father, and that his possession in that way continued until the employment of defendant in his father's foundry business ended in 1899, and therefore that the Statute of Limitations never began to run till that time. . . .

I think the effect of all the evidence upon the relationship between the father and the two sons is that he allowed each of them the use of a house and garden, and each to draw from the business what was necessary for his living expenses beyond the use of his house and garden, and that, while the business was advertised as James Coulter & Sons, the capital was all furnished by the father, and there is no evidence of any right in the sons to draw from the resources of the business beyond what was necessary to maintain their respective

families. Whether the two sons expected to succeed to the business does not appear.

I think the evidence fully justifies the conclusion of the trial Judge, and that defendant was given, first, the rent of the house and afterwards the use and occupation of it as part compensation for his services in his father's business, and under these circumstances I also agree with the trial Judge that the Statute of Limitations would not begin to run in favour of defendant so long as the employment continued, the enjoyment of the premises being a part return for his services. . . . Under such circumstances, title cannot be acquired by length of possession during such employment. See *Berti v. Beaumont*, 16 East 33; *The King v. Chestnut*, 1 B. & C. 473; *The King v. Snape*, 6 A. & E. 278; *Moore v. Dougherty*, 5 Ir. L. R. 449 (1843.).

The occupation of the premises by defendant was ancillary or incident to his employment by the testator. In other words, I think the service and the occupancy were incidents of one arrangement or agreement between father and son, and that no other tenancy relationship ever existed between the parties.

Appeal dismissed with costs.

JULY 11TH. 1904.

DIVISIONAL COURT.

BRADLEY CO. v. WILSON LUMBER CO.

Appeal—Division Court Appeal—Jurisdiction to Hear—Condition Precedent—Notice of Setting down.

Motion by plaintiffs to quash appeal by defendants from order made in 10th Division Court in county of York dismissing defendants' application for a new trial of the action after a judgment in favour of plaintiffs.

The grounds of the motion were, (1) that the certified copy of the proceedings in the Division Court, which was filed in due time, did not contain the notes of the evidence taken at the trial, and (2) that, although the appeal was set down in due time, the defendants did not, as required by sec. 158 of the Division Courts Act, give notice of the setting down and of the appeal and of the grounds thereof to plaintiffs at least 7 days before the commencement of the first sittings of a Divisional Court which commenced after the expiration of one month from the decision complained of:

H. W. Mickle, for plaintiffs.

W. H. Blake, K.C., for defendants.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that the notice of setting down was a condition precedent to the jurisdiction of the Court, and the second ground of objection was fatal. Nothing was decided as to the first ground.

Appeal quashed without costs.

BRITTON, J.

JULY 12TH, 1904.

TRIAL.

McLAUGHLIN AUTOMATIC AIR BRAKE CO. v.
ALLAN.

Execution—Sheriff's Sale under—Patent for Invention—Irregularities at Sale—Want of Proper Notice—Advertising—Setting aside Sale—Action—Parties—Costs.

Action by execution debtors against execution creditors, sheriff, and purchaser, to set aside a sale, under execution, of a patent for invention.

E. S. Wigle, Windsor, for plaintiffs.

J. W. Hanna, Windsor, for defendants Allan and Iler.

A. H. Clarke, K.C., for defendants the Lake Erie and Detroit River R. W. Co.

BRITTON, J.—The Lake Erie and Detroit River R. W. Co. on 3rd November, 1903, upon a judgment which they had recovered, issued a writ of fi. fa. against the goods and lands of one William G. McLaughlin and the plaintiffs for the recovery of \$498.67 with interest. This writ was delivered to and received by the sheriff on 4th February, 1904. With the writ the sheriff received a letter from the solicitor for the execution creditors . . . part of which is as follows: "Direct your efforts to making the money out of the plaintiff company. I am informed that they own at least one patent for invention in Canada. . . . I suggest your taking steps to realize out of the patent of invention as the most effective means of securing payment."

The sheriff notified the plaintiff company. He prepared an advertisement of sale, dated 9th February, 1904, and on that day sent the draft of it to the solicitor for the execution creditors, who revised, corrected, and returned it to the sheriff. . . . The sheriff then made 3 copies, one of which he personally posted up on the fence at Bermisky's woodyard; the other two he gave to his bailiff Wright, with instructions to hand one to Mr. Rodd, secretary of plaintiff

company, and to post the other up. The notice of sale was of all the right and interest of William G. McLaughlin and the McLaughlin Automatic Air Brake Co. in a certain patent of invention (describing it.) The sale was for 10 a.m. on 20th February, 1904, at the office of the sheriff, Sandwich. . . .

On the day and at the hour named for the sale four persons were present. . . . The sheriff offered the patent for sale. The letters patent were not produced, but offered as described in notice. William G. McLaughlin says he bid \$590. There is not an agreement between the witnesses as to the bidding or as to just what took place at the sale, but the bidding was confined to McLaughlin, Norman Allan, and one Guitard. . . . Finally Norman Allan bid \$605, and he was called the purchaser. Although he bid only \$605, the sheriff's fees were added, and his bid was treated as \$646.14, which amount was paid by cheque of defendant Henry W. Allan. . . .

I do not think the sale can stand. The sheriff acted in a way which must be considered negligent in law in conducting the sale. He apparently treated the matter rather as a settlement than as a sale, and this is shewn by his getting \$646.14 when only \$605 was bid. He did not consider that the execution debtors, the owners of the patent, had rights which he, the sheriff, as a public officer, was bound to consider. The sheriff took no steps to ascertain the value of the patent which he in form seized, and which he was offering for sale. He knew that the execution debtors, the owners of the patent, were not represented. . . .

The case is one in which the sheriff must be held to proof that he complied strictly with what was required by law of him. It has not been proved that notice was given as required by law. The sheriff's bailiff did not say he put up any notice. The one put up by the sheriff personally was put up after the 9th February; the exact time is not given. The place where put up can hardly be considered, upon the evidence, as a compliance with the law. See Rule 875.

The owners of the patent considered it valuable. The sheriff, without inquiry, with no special direction at the time to sell, assumed to sell the whole patent, and he did this under a fi. fa. It might have been very different if he had returned this writ and had received a writ of ven. ex.

There must be a reasonable and proper care to advertise: *Crume v. Murphy*, 20 L. R. Ir. 57. See *Jones v. Jones*, 15 Gr. 40; *Barker v. St. Quentin*, 12 M. & W. 441.

I see no reason . . . for joining the railway company, the execution creditors, as defendants. . . . I think there should be no costs to these defendants. . . .

Judgment for plaintiffs against defendants Allan and Iler setting aside the sale with costs.

MEREDITH, J.

JULY 12TH, 1904.

TRIAL.

BELL TELEPHONE CO. v. TOWN OF OWEN SOUND.

Municipal Corporations—Telephone Poles and Wires in Streets—Power of Interference—Good Faith—Collateral Purpose—Enforcing Tax—Injunction—Federal and Provincial Legislation—Underground Wires—Supervision.

Action to restrain defendants from interfering with certain work of plaintiffs in the town of Owen Sound.

G. Lynch-Staunton, K.C., for plaintiffs.

A. B. Aylesworth, K.C., for defendants.

MEREDITH, J.—The facts of this case are simple and free from doubt. Plaintiffs' system of telephone communication has been in operation in defendants' municipality for some years, and, as usual in this country, by means of overhead wires upon wooden poles. Their office was upon the main street of the town, and the wires were carried into it from two poles—carrying the wires from opposite directions over the main street—on the opposite side of the street to a pole upon the same side, and thence into the office. They removed from that office into a new one, next door to it, and so it became necessary to move the wires, and that plaintiffs proposed doing by putting them underground, instead of overhead, thus removing one at least of their large and anything but picturesque poles, and all the danger and unsightliness of a great number of wires crossing the main street in two directions.

The thing was so obviously better for every one concerned that it is impossible to imagine any objection in good faith to it. In the interests of the public and in the interests of defendants nothing but advantage could come from thus changing the mode in which the wires crossed the thoroughfare. It is plainly insincere . . . to suggest that the road or the sidewalk would or could be injured by the work if done even with ordinary care. It could be done in a few hours, if need be, without inconvenience to traffic at all, and without interfering in the least degree with the sidewalk or curb or gutter, or doing a particle of injury to any of them or to the roadbed. The road is but a macadamized one, and one that

is often opened for far less generally useful purposes. Any objection to the work on this ground is purely a subterfuge to cover some ulterior purpose, and that purpose is plain, namely, to coerce plaintiffs to pay to defendants a tax upon their business in the municipality, which defendants have no sort of legal right to enforce or demand. Their objection to the work is not made in good faith, but is for a purpose *ultra vires* and wholly unwarranted.

Legislation, both federal and provincial, has conferred upon plaintiffs certain powers in respect of public ways. These powers are conferred quite as much in the public interest and for the benefit of the public as for the private gain of plaintiffs, and are subject to certain restrictive powers conferred upon the municipalities—these powers being also conferred in the public interests and to be exercised for the public benefit as much as for the protection of the rights and interests of the municipality. Whether federal or provincial legislation is to prevail, or whether both in regard to matters in which there is no conflict between them, are questions not necessarily requiring consideration in this case, upon the facts before set out. But it may be said that if provincial legislation prevails, plaintiffs have admittedly the right to carry their wires under the street as they desire to do, and defendants have no power to prevent the work. In any case the Legislature has power to legislate as to public ways and municipal corporations, and, it may be, to confer an additional right upon plaintiffs in such ways and against such corporation, even if the general right of legislation in respect of plaintiffs and their undertakings belongs to Parliament. Parliament has clearly and distinctly given plaintiffs power to carry their wires over or under public streets, but has made that right subject to the restrictive rights before alluded to. The latter rights must be exercised in good faith and for a legitimate purpose, and should be reasonably exercised; instead of that, they have been unreasonably exercised, in bad faith, and for a purpose not authorized or within the power of defendants, so that, whatever these rights may be, plaintiffs are entitled to succeed in this action: see *London and North Western R. W. Co. v. Mayor of Westminster*, [1904] 1 Ch. 759.

Defendants will, therefore, be perpetually restrained from interfering with the work of plaintiffs in carrying their wires to their new office under instead of over the highway, for the purpose of exacting any tax or payment, disconnected from such work, from plaintiffs, or otherwise than in good faith and in accordance with the federal legislation.

Whatever may be the powers of a corporation when plaintiffs first enter the municipality, or when they are making great changes in their works after such entry, in this case defendants, acting in good faith, cannot impose restrictions beyond providing for the careful doing of the work and restoration of the street, so that no loss is sustained or injury done to defendants, or to any one entitled to the use of the highway, by reason of the work. That is a thing commonly provided for in municipal by-laws requiring the work to be done under the direction of a competent officer of the municipality, and sometimes the deposit of a reasonable sum of money to ensure the doing of the work as so directed, or if not so done of enabling the corporation to have it so done and to pay for the work out of the money so deposited.

Defendants must pay the costs of the action, subject to their right to set off the additional costs, if any, caused by the trial at Hamilton, instead of at Owen Sound.

Upon the broad question of the powers of municipal councils under sec. 3 of the federal enactment as amended . . . the extravagant claim of defendants that it rests with the municipal councils to determine as they see fit when and how plaintiffs shall construct their lines, seems to me quite unwarranted by the enactment. . . .

[Reference to *City of Montreal v. Standard Light and Power Co.*, [1897] A. C. 527, and *City of Toronto v. Bell Telephone Co.*, 6 O. L. R. 335, 2 O. W. R. 750.]

The section presents no difficulty to my mind; in the interests of the public the clear rights of user of the highways are given to plaintiffs; they could not carry on their operations very well without them; in the interests of the public, and for the protection of the interests of the municipalities in the highways, these rights are to be exercised under the supervision of an officer of the municipality, in such manner as the council may direct, in regard to the location of the lines which plaintiffs under their rights intend to construct, and in regard to the opening up of the streets; that is, acting in good faith the council can thus control the placing in the particular highways selected by plaintiffs of the poles or of the wires underground, as plaintiffs may decide to place them, and require all that to be done which will best tend to prevent unnecessary obstruction to the highway and save the municipal corporation from loss or expense by reason of plaintiffs' works.

On this ground also plaintiffs' case can be rested, but I have preferred to put it on the other ground, as it seems to be necessary that the municipality should know that the powers conferred upon them are not to be exercised for what

have been called in one of the leading cases sinister or collateral purposes. When Parliament or the Legislature permits money to be made by municipal corporations out of power conferred on them, it usually says so, as in such enactments as secs. 639, 640 (4), 657, and 331, of the Consolidated Municipal Act, 1903.

ANGLIN, J.

JULY 13TH, 1904.

WEEKLY COURT.

ATTORNEY-GENERAL FOR ONTARIO v. TORONTO
JUNCTION RECREATION CLUB.

*Company—Revocation of Charter—Action by Attorney-General
—Proceeding by Order in Council while Action Pending—Injunction—Crown.*

Motion by defendants for an interlocutory injunction restraining plaintiff from recommending to the Lieutenant-Governor in council that an order in council be passed cancelling the charter of defendants, and from doing any other act or thing with the object of cancelling the said charter or procuring the same to be cancelled otherwise than by order of the Court in this action.

E. F. B. Johnston, K.C., for defendants.

J. R. Cartwright, K.C., and H. H. Dewart, K.C., for plaintiff.

ANGLIN, J.—The defendants are a body corporate by letters patent issued under the Ontario Companies Act, R. S. O. 1897 ch. 191.

Section 4 of that statute reads: "The incorporation of every company hereafter by letters patent shall be governed by this Act, and all the provisions of the Act shall apply to every such company, subject to the provisions of any general Act applying to such company."

Section 99 is as follows:—"The charter of a company incorporated by letters patent may, at any time, be declared to be forfeited, and may be revoked and made void by an order of the Lieutenant-Governor in council, on sufficient cause being shewn to the Lieutenant-Governor in council in that behalf. . . ."

Since this action has been at issue the Attorney-General has summoned the defendants before him to shew cause why their charter should not be revoked. It is to prevent the exercise of the power of revocation that the present motion is made.

Counsel argued at some length that the Crown, by assenting to a statute expressly providing for the incorporation of companies by letters patent, and the cancellation of such letters patent, waived its prerogative right to grant and to revoke such letters. I find it unnecessary to deal with this question. Assuming the power of revocation now to depend upon the statute, it may well be that its provision, in form conferring or reserving a right, in substance and in reality imposes a duty to be discharged in all proper cases for the public well-being: *Julius v. Bishop of Oxford*, 5 App. Cas. 214. Where a mere right or privilege may be waived or suspended, a duty cannot be thus abandoned. But, whether the right of cancellation of letters patent of incorporation be now only statutory and merely a power, not a duty, or whether the prerogative right still subsists, in my opinion the bringing of this action has not clothed the Court with jurisdiction to restrain its exercise.

Counsel argued that the Crown, seeking the aid of this Court, adopting remedies assigned to its subjects, waives rights and privileges peculiar to itself, and subjects itself to such orders and mandates as the Court may, under like circumstances, issue against a subject litigant. To sustain this proposition upon the authority of *Regina v. Grant*, 17 P. R. 165, counsel stated that the Crown, for the purposes of any action which is instituted, submits itself to all the ordinary rules of practice and procedure of the Court which it enters. Not conclusive upon the question now under consideration, which is not one of practice or procedure, the statement is subject to several notable qualifications and exceptions.

For instance, the Crown, though it has the same right of discovery as a subject, may not be ordered itself to give discovery: *Attorney-General v. Newcastle*, [1897] 2 Q. B. 384. The right to withhold discovery is a prerogative of the Crown which it does not relinquish by instituting litigation. The Crown, suing through its duly constituted officers, upon obtaining an interlocutory injunction, may not be required to give an undertaking as to damages: *Attorney-General v. Albany Hotel Co.*, [1896] 2 Ch. 696. "The King's Majesty cannot be nonsuit, because in judgment of law he is ever present in Court:" *Co. Litt.* 139 b. *Jure Coronæ*, the Sovereign is entitled to be actor in any litigation affecting his rights: *Attorney-General v. Barbour*, L. R. 7 Ex. 177. The Crown, as a prerogative right, is exempt from payment of costs. As a plaintiff, therefore, the Crown by no means puts itself in all respects in the plight of a subject-litigant.

If seeking the opinion of the Court upon any matter relating to the exercise of prerogative rights or executive func-

tions, involves the suspension, even temporary, of such rights or functions, very grave consequences may ensue. Thus should the Attorney-General bring action for a declaratory judgment upon a question whether, under certain circumstances, the title of the Legislature had expired by fluctuation of time, pending the determination of such action by a judgment pronounced in due course, it might be argued that the prerogative right of the Lieutenant-Governor to summon or to dissolve the legislative body would be in abeyance and could not be employed, whatever urgency might arise for its exercise. Again, should the Attorney-General for Canada institute legal proceedings against the Attorney-General for Ontario to obtain a decision of the Court as to whether, in regard to certain offences, the prerogative right of pardon is vested in the Governor-General or in the Lieutenant-Governor, it would follow that *pendente lite* His Excellency's pardoning power in regard to such offences would be suspended. I cannot assent to this proposition.

The Lieutenant-Governor in council may, upon many grounds other than those set forth in the statement of claim in this action, and constituting sufficient cause, deem it expedient to revoke the charter of the defendants. Circumstances may at any moment arise which will render it the sworn duty of the Attorney-General, as one of His Honour's advisers, to counsel and promote such action. By asking this Court to declare certain stated facts to be a sufficient cause for revoking such a charter, the minister cannot divest himself of the duty and responsibility undertaken by his oath of office, to advise that executive action be taken in the interests of the Crown, "which are now about equivalent to those of the public," upon other facts, or even upon the same facts, if the urgency of the case which they establish for cancellation of the defendants' charter should, pending this litigation, make itself apparent. It may well be that when the Attorney-General began this action, his view was that public interests would not suffer by the delay involved on its due prosecution. He may now have good reason to believe otherwise. Counsel may have advised that this Court may see fit to decline to grant a merely declaratory judgment. Whatever the reasons for which, in the exercise of his discretion and the discharge of his duty, the Attorney-General may deem it right to advise executive action, I cannot find any ground for holding that he can be restrained from tendering such counsel, or from assisting in the necessary steps to give it effect.

Mr. Johnston concedes that, if this action were discontinued by leave of the Court (Rule 430), or even if it had

been tried and the Court had, by its judgment, declared the facts submitted not to be a sufficient cause for revocation, the Lieutenant-Governor in council might immediately proceed to annul the defendants' charter. If, having, as a suitor, obtained the opinion of the Court, the Crown is not obliged to abide by the decision which it has so invited, it is difficult to understand why it should be bound to await the actual pronouncement of a judgment, which it may disregard when given.

There are some reasons why, if I at all doubted the lack of jurisdiction to grant the order asked, I should hesitate to hold the Crown's rights, statutory or prerogative, to be in abeyance pending this action.

That the Court has not jurisdiction, at the suit of a subject, to command, or to restrain, the Crown or its officers acting as its agents or servants, or discharging discretionary functions committed to them by the Sovereign, is established by many authorities, of which, as one of the most recent, I may refer to *The Queen v. Secretary of State for War*, [1891] 2 Q. B. 326, 334, 338. For the exercise of the powers or the discharge of the obligations with which the Court is here asked to interfere, the Attorney-General is answerable and responsible to the Crown alone. He owes no duty to the defendants.

No precedent has been cited for the granting of such an injunction on the application of a subject-defendant, though many suits affecting rights of the Crown have been maintained by the Attorney-General in England and her colonies. Such actions are in fact the suits of His Majesty, instituted by his law officer, the Attorney-General, and it is not therefore surprising that the research of the learned counsel for the defendants has unearthed no instance of any such anomalous order as that which he now asks, by which His Majesty, through the instrumentality of this Court, would restrain himself in the exercise of functions of his executive government. Cockburn, C.J., says: "This Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question." *The Queen v. Lords Commissioners of The Treasury*, L. R. 7 Q. B. 388, 394.

Upon the argument before me counsel for the defendants suggested that, though the order asked should be refused, an expression of opinion that the Attorney-General should, pending this action, refrain from pursuing the course to which the defendants have taken exception, would be respected by him. While I have no doubt that the Attorney-General would pay due regard to any proper expression of judicial opinion,

I must decline to assume the rôle of adviser upon the propriety or impropriety of any course which he sees fit to take in such matters. Any expression of my opinion, beyond what is proper and necessary for the disposition of the motion before me, would be extra-judicial, and probably impertinent as well. It is no part of the function of a Court of law, at the request of the party in the position of the defendants, to express "some sort of pious opinion as to the mode in which the discretion of the Attorney-General, and the Attorney-General alone, should be exercised, in a case in which he thinks it his duty to intervene:" per Lord Halsbury in *London County Council v. Attorney-General*, [1902] A. C. 165, at p. 168.

Being clearly of opinion that this Court has no jurisdiction to entertain it, I must dismiss the motion made on behalf of the defendants. I think the Attorney-General entitled to his costs, if he claims them: *Daniel's Ch. Pr.*, 7th ed., p. 60.

MACMAHON, J.

JULY 13TH, 1904.

TRIAL.

DELAPLANTE v. TENNANT.

Contract—Sale of Goods to be Manufactured—Breach—Construction of Contract—"If it is Satisfactory"—Damages—Property Passing—Destruction by Fire—Appropriation of Goods to Contract.

Plaintiff wrote to defendant on 11th April, 1902, as follows: "Re 1902 cut of hemlock. We will give you \$8.75 per M. for all your hemlock at Bracebridge, cut to our order, less 2 per cent., 30 days from date of shipment, the whole to be shipped out by Mar. 1st, 1903, or paid for less 2 per cent. This offer includes all hemlock to be cut at the switch, providing the manufacture and sorting is the same as the Bracebridge stock. Kindly send us an acceptance of this offer."

To this defendant replied on 15th April: "In reply to yours of the 11th inst. re my cut of hemlock, say that I will accept your offer of \$8.75 per M. less 2 per cent. thirty days from date of shipment. Stock to be taken each month and 25 per cent. advanced. The whole to be shipped out by March 1st or paid for. This will include the hemlock at the switch if it is satisfactory."

Defendant, after the contract was entered into, cut and delivered all the hemlock at Bracebridge, mentioned in the first paragraph of the offer, but delivered none of the hemlock at the "switch."

At the time the offer was made, there were logs at the switch, from which 402,500 of lumber was manufactured. These logs were sold by defendant on 15th September, 1902, and were cut in March, 1903, and the lumber realized \$10.25 per thousand.

Plaintiff sued for damages for the breach of the contract. There was a counterclaim for the price of certain lumber.

J. Baird, for plaintiff.

R. U. McPherson, for defendant.

MACMAHON, J.—The offer by plaintiff to purchase the hemlock at Bracebridge included the offer to purchase that at the “switch,” and formed one contract, unless the words “if it is satisfactory” contained in the defendant’s letter precludes it from being an assent to the plaintiff’s offer for that particular hemlock.

On 12th August, 1902, plaintiff wrote asking defendant: “How about the stock at the switch? Have you cut any of it yet? When do you expect to cut it?” On 14th August defendant replied: “About the stock at the switch, I have been unable to get any one to cut it, and do not think I will be able to get it cut this fall.”

On 13th February, 1903, plaintiff in writing to defendant asked: “When do you expect to cut out the 6,000,000 feet at the switch which we bought last year? Kindly let us know by return mail.” On 16th February defendant replied: “I have sold my stock to the Laidlaw Lumber Company. I had some financing to do with them on the stock now cut, and had to sell to them on that account. I have sold the logs at the switch.”

On 26th February defendant wrote to plaintiff: “I could not get them (the logs at switch) cut satisfactorily, so had to sell them in the logs. When we made the deal last April about the Bracebridge, they were included if satisfactory only. At that time I had the contract let for the sawing, but later my man threw up the job, and I could not get any one else to do it, and that is the reason why I sold the logs as they were.”

Defendant had until 1st March, 1903, in which to get out the hemlock, and in his letter of 14th August, 1902, he thought he would not be able to get it out that fall. There is no assertion that under the agreement it must be “satisfactory” to him whether he will get it out or not. The letter would lead the person receiving it to assume that, as he could not get it out that fall, he intended getting it out the following winter and spring in time to comply with the terms of the contract. Yet in the following month (15th

September) he sold the logs at the switch and gave no notification to plaintiff of what he had done or that he did not intend filling the contract from some other source.

No one ever heard of goods being supplied to an intending purchaser which were to be to the "satisfaction" of the vendor, or that an article to be manufactured was to be manufactured to the "satisfaction" of the manufacturer.

Plaintiff said that by the words "if satisfactory" he meant that if he got the hemlock cut so as to be satisfactory to himself he (plaintiff) was to have it. As the hemlock at Bracebridge was to be cut to the order of plaintiff, and as the hemlock at the switch was included in the offer, that likewise was to be cut to his order, i.e., cut to his satisfaction.

The effect of the offer made by plaintiff was, I consider, in no way varied by the words "if it is satisfactory" in defendant's acceptance.

Defendant agreed to sell all lumber that would be cut from the logs at \$8.75 a thousand, and nothing turns on the words "to be cut." The contract is of a like character to that of a mill-owner selling the whole output of his mill for the season at a named price per thousand feet.

Hemlock lumber advanced in March, 1903, and \$11 per thousand was then paid Mr. Bawden for hemlock f. o. b. at the mills. The plaintiff paid higher prices, but I accept Mr. Bawden's statement as being a fair average price.

Plaintiff is entitled to recover \$2.25 per thousand on 402,000 feet. . . . \$904.50.

I find that, when plaintiff purchased he told defendant he was purchasing on his own account, and that Laidlaw & Co. had no interest in the lumber, although he assigned his interest in lumber at Bracebridge to Laidlaw & Co., from whom he received a profit of 75 cents per thousand.

Then as to the counterclaim. Defendant claimed from plaintiff \$157.80 and interest from 1st March, 1902, balance owing for lumber sold by defendant to plaintiff on 12th April, 1902. . . .

This was part of the Bracebridge cut, and according to defendant's evidence all the lumber that was cut and piled in the yard at Bracebridge was paid for by the end of March, 1902, and all shipped out. After that plaintiff ran his mill for two days, and the counterclaim was for two days' cut of lumber which defendant stated was put in piles, and each pile marked L.A.D. & Co. as indicating L. A. Delaplane & Co., under which name plaintiff was carrying on business.

This lumber was burned in a fire on defendant's premises on 20th April, 1903.

On 12th June, 1903, defendant wrote plaintiff; "According to my books, there is a balance coming to me of \$157.80,

that is with the lumber you had burned. Not hearing from you, I will draw on you for the above amount."

The contract provides that lumber is to be paid for in 30 days from shipment, and defendant loaded the lumber on the cars at Bracebridge and said he regarded it as part of the contract to do so; when loaded on the cars he drew against the shipments. There was no intimation to plaintiff that the lumber had been cut or was then in the yard, nor is there in the correspondence put in at the trial any notification that the lumber had been destroyed until the letter of 12th June, 1903, when defendant said he intended drawing for "a balance coming to me of \$157.80, that is with the lumber you had burned."

As the usual course was for defendant to place on the cars the lumber appropriated to the contract with plaintiff, and then draw against it, I think there was no "unconditional appropriation," of the particular lumber the price of which is now claimed, until placed on the cars.

There will be judgment for plaintiff on his claim for \$904.50 with costs, and judgment dismissing defendant's counterclaim with costs.

JULY 13TH, 1904.

DIVISIONAL COURT.

CHRISTIE v. COOLEY.

Deed—Construction—Temporary Grant of Strip of Land—Erection of Building—Destruction or Damage by Fire—“Shall Remain Standing”—Rebuilding or Repair.

Appeal by defendant from judgment of County Court of Hastings in favour of plaintiff in an action to recover possession of a strip of land 4 feet wide, part of lot 5 on the easterly side of Water street, in the town of Trenton.

The right of plaintiff to possession depended on the meaning and effect to be given to an instrument dated 15th January, 1883, made between one Gordon, then the owner of the whole of lot 5, and plaintiff.

At the time the instrument was executed, there was in course of erection on the lot, which had a frontage of 66 feet on Water street, a three-storey brick building, divided into 3 stores, each of the same width.

The northerly part of the lot had been purchased by plaintiff from Gordon. The southerly part was retained by Gordon, and the buildings on it, and so much of the part sold to plaintiff as was covered by the middle store, were intended to be used as an hotel.

The building came up to the street line in front, and extended back to a depth of 50 feet, leaving an open space behind it of about 26 feet in depth.

Gordon was at the same time negotiating for the sale of the remainder of the lot to one Perrault, but Perrault was not willing to buy unless he could obtain the right to build an addition to the hotel covering the strip in question as well as the land of Gordon. This strip Gordon endeavoured to get plaintiff to give up; plaintiff refused to do that, but agreed to give up a limited right to it.

Perrault then bought from Gordon, and erected the contemplated addition to the building.

The instrument of 15th January, 1883, was made in pursuance of the Act respecting short forms of conveyances; by it Gordon purported to grant to plaintiff the northerly 25 feet of the lot together with the northern store, etc. The instrument contained a clause by which plaintiff authorized and empowered Gordon to appropriate and use a longitudinal strip of land along the northerly side of the 25 feet, of about 4 feet in width, extending from the rear of the brick block to the river Trent, for the purpose of erecting a suitable building in rear of and in connection with Gordon's remaining interest in the strip, free from all claims for ground rent and of ownership in respect of the proposed erection—"this grant to remain in force only so long as the said building so to be erected shall remain standing on the said 4 foot strip, and no longer."

In 1899 a fire occurred, the effect of which was somewhat seriously to damage the addition to the hotel, including the part built on the strip.

Plaintiff contended that, as the result of this fire and damage, the building no longer "remained standing" on the 4 foot strip, and that the right of defendant, who owned whatever interest in the strip was conveyed to Gordon, to appropriate and use it, was at an end.

At the trial there was a conflict of testimony as to the extent of the injury done to the building, and the County Court Judge found in favour of plaintiff's contention.

E. D. Armour, K.C., for defendant.

T. A. O'Rourke, Trenton, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

MEREDITH, C.J. (after setting out the facts):—The proper conclusion upon the evidence is, in my opinion, that there was nothing like a complete or total destruction of the

building; it was, no doubt, somewhat seriously damaged, but not to such an extent that it was necessary to rebuild it, using the word "rebuild" in contradistinction to "repair;" the addition was, no doubt, rendered temporarily unfit for occupation, though a part of it seems to have been used in the hotel business after the fire and before its restoration; the repairs were made and the building was restored, though its height was reduced by one storey, for the purpose, as was testified, of affording better light to the upper part of the main building, and the restoration was completed very soon after the fire, and at a comparatively trifling cost, and one that bore but a small proportion to the value of the restored building.

It is also a fair conclusion from the evidence that a prudent owner of both building and land would have taken the same course that defendant took, and would have repaired as she did. . . .

The building was not . . . destroyed, but only damaged, by the fire, and had the event on which the right of defendant was to come to an end, been "the destruction by fire" of the building, I should have had no doubt that that event had not happened.

When, as in this case, a building is damaged, though not so seriously but that it can be and is repaired and made fit for use again for the purpose for which it was originally designed, at a comparatively trifling expense, and with but a brief interruption to the use of it, it would, in my opinion, be quite inappropriate to speak of it as having been destroyed. The building was, in my opinion, not destroyed but only damaged, and not rebuilt but only repaired.

I refer to *Wall v. Hinds*, 4 Gray (Mass.) 256; *Spaulding v. Munford*, 37 Mo. App. 281; *Einstein v. Levi*, 25 N. Y. App. Div. 565. . . .

If plaintiff's contention is well founded, had a fire . . . occurred the very next day after the instrument was executed, resulting in the roof being burnt off . . . or even partly so, but so as to render the building temporarily, though for never so short a period, unfit for occupation, and although a very small expenditure of money and a very few days would be required to repair it so as to restore it to its original state, the right to occupy would be gone forever, and defendant bound to give up possession, leaving the building to become the property of plaintiff, for him to make it good, if he chose, at a trifling cost.

I cannot bring myself to adopt a construction of the instrument which would produce such a result, and, however precarious may be the tenure of defendant—and as to this I express no opinion—it is not, in my opinion, so

precarious as to have been put an end to by what has happened.

Appeal allowed with costs, and action dismissed with costs.

MEREDITH, C.J.

JULY 15TH, 1904.

TRIAL.

HARRIS v. SIMPSON.

Sale of Goods—Action for Price—Injury after Delivery—Warranty—Examination.

Action to recover the price of skins sold by plaintiff to defendants.

D. O. Cameron, for plaintiff.

G. F. Shepley, K.C., for defendants.

MEREDITH, C.J., held, on the evidence, that the skins substantially answered the contract which was entered into between plaintiff and defendants' agent Emory, and that they were injured while undergoing the process of dressing after they had been purchased by and delivered to defendants. Plaintiff warranted that the skins would be suitable, if and when properly finished, for making up into fine ladies' mantles; if the skins had not been injured in the dressing they would have been suitable for that purpose. Plaintiff took back the skins, but he did so not unconditionally, but in order to examine them. Judgment for plaintiff for \$967.20 with costs. Plaintiff was entitled to the money in Court.

JULY 15TH, 1904.

DIVISIONAL COURT.

MILLOY v. WELLINGTON.

Husband and Wife—Wife Living apart from Husband—Foreign Divorces—Invalidity—Form of Marriage with Defendant—Criminal Conversation—Abandonment of Wife—Question for Jury—Judge's Charge—Adultery before Form of Marriage—Rumours—Hearsay Evidence—Improper Reception—Submission to Jury—Misdirection—Excessive Damages—New Trial.

Appeal by defendant from judgment of ANGLIN, J., in favour of plaintiff, upon the findings of the jury, for \$5,000 damages, in an action of criminal conversation.

The charge to the jury is reported in 3 O. W. R. 561.

Defendant asked to have the action dismissed, or in the alternative for a new trial, on the grounds of the improper reception of evidence, misdirection, and excessive damages.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., TEETZEL, J.

C. H. Ritchie, K.C., and E. B. Ryckman, for defendant.
W. R. Smyth, for plaintiff.

MEREDITH, C.J.— . . . Plaintiff and his wife have lived separate from one another since 1889 or 1890, and since that separation have never even met, nor has any communication passed between them.

They were married in 1875, and no serious disagreement occurred between them up to the end of December, 1889, when the wife went from her home at Niagara to visit her parents at Toronto . . . Plaintiff was not willing that she should pay this visit, though it does not appear that he forbade her to make it. . . They differ widely as to the causes which led to the wife never having returned to her husband.

According to plaintiff's story . . . while his wife was absent in Toronto on this visit, he accidentally discovered that in the previous October or November, when she went to Buffalo, ostensibly to pay a visit to a Mrs. Campbell, promising to return the next evening, she had deceived him, as Mrs. Campbell was not then living in Buffalo but in Toronto, and that she had also deceived him on her return from Buffalo on the second evening after she had gone there, by telling him, when he asked for an explanation as to why she had not returned on the previous evening, that Mrs. Campbell had insisted on her remaining with her for another night; that upon making this discovery he became suspicious, but of what he did not say, and wrote to his wife for an explanation, and receiving none that his suspicions deepened to such an extent that in the January following he caused to be published in three of the Toronto newspapers a notice that his wife had left his bed and board on the 30th December.

According to the testimony of the wife, she did not deceive plaintiff as to the visit to Buffalo, or tell him that she was going to Mrs. Campbell's, nor did she say that she would remain away for one night only, or make any such explanation as plaintiff said that she had made on her return from Buffalo; that no letter asking for an explanation of this or

any other matter was received by her from plaintiff, but that the reason for her not having returned to her home was that some time in January, on an examination being made of her person by a physician, it was discovered that she was suffering from what was apparently (for she was not permitted to testify as to the nature of it as told to her by the physician) a venereal disease communicated to her by her husband; that upon this discovery being made, after consultation with her parents, she decided not to return to her husband, and it was arranged that her father should communicate to plaintiff her determination and the reason for it, which she believed her father did.

Plaintiff denies having received any such communication, and all knowledge that any such accusation was made against him, and he also gave an emphatic denial of the accusation itself.

If the story told by plaintiff be accepted as true, it is not, I think, open to doubt that the attitude which he took was that he would not receive his wife back until she had given him the explanation which he demanded of her, and that he in effect put her away because she had not complied with his demand, although, according to his testimony, he stood ready at all times to receive any explanation which she should choose to make, and to receive her back if it was satisfactory to him.

There was, in my opinion, making the same assumption as to plaintiff's story, no justification whatever for his action, nothing to warrant him in concluding, if he did conclude, that his wife had done anything which entitled him to put her away, and nothing to excuse, and still less to justify, the course which he took in publishing to the world that she had left his bed and board.

If, on the other hand, the wife's story be accepted as true, there was strong, if not conclusive, evidence that plaintiff had been guilty of conduct which fully justified her refusal longer to cohabit with him.

In either view, the separation was caused by the wrongful act of plaintiff, and the case is not, therefore, that of a wife who is living separate from her husband without his consent, and the right of plaintiff to recover is not, therefore, to be determined upon the principle enunciated by the Chief Justice of Ontario in *Bailey v. King*, 27 A. R. at p. 712.

I proceed now briefly to notice the course of events after the separation took place. After the lapse of a year, the

wife went to Chicago to earn a living for herself, and remained there about three years. While in Chicago she obtained, in the Circuit Court of Cook County, in the State of Illinois, a decree purporting to dissolve the bonds of matrimony between her and plaintiff, and to confer upon her the right to resume her maiden name, Anna Douglas. The decree is dated 15th February, 1892, and by its terms is conditional, and subject to be set aside at any time within three years

- Plaintiff's wife returned to Canada, and from the date of the decree ceased to bear plaintiff's name, and has ever since, until she went through a form of marriage with defendant, borne and been called and known by her maiden name.

Defendant was a married man, and on 20th February, 1899, a decree of a Nebraska Court was made, in a proceeding instituted by his wife, purporting to dissolve the bonds of matrimony between him and his wife. This decree, as I understand, did not become absolute until six months from its date had elapsed.

On 23rd September, 1899, defendant and plaintiff's wife went through a form of marriage at Rochester, in the State of New York, and have since then lived together as man and wife.

Plaintiff in his pleadings alleges that adulterous intercourse took place between his wife and defendant in 1895 and at various times since then and up to the commencement of the suit.

At the trial it was attempted to be shewn that defendant had committed adultery with plaintiff's wife before as well as after the marriage ceremony of 23rd September, 1899, but that attempt, as I shall afterwards point out, wholly failed.

According to the testimony of plaintiff, he was not notified of the divorce proceedings taken against him by his wife, though he admitted that he heard of them and of attentions that were being paid to his wife by defendant before the marriage ceremony took place, attentions, too, which, according to the information which he said he received, were of an improper character, indicating that adulterous intercourse was going on between them.

His attitude to his wife, during all this time, according to his testimony, was that he was ready and willing at any time, until he learned of the immoral relations existing between her and defendant and the granting of her divorce,

to take her back if and when the long delayed explanation which he had demanded should be forthcoming, and that he had not until then entirely abandoned hope of a reconciliation with her. . . .

If then the attitude of plaintiff towards his wife was what he testifies it was, and the jury must have found it to have been, what effect, if any, has the fact of his separation from his wife, unjustifiable as, in my opinion, it was, upon his right to recover in such an action as this against defendant for the adultery of which he was guilty in having, as admittedly he has had, sexual intercourse with plaintiff's wife on and after 23rd September, 1899.

It was at one time . . . held that such an action does not lie where, at the time the act of adultery is committed, husband and wife are living apart by mutual agreement, the ground . . . being that the criminal act is not the gist of the action, but that it is a civil action brought to recover satisfaction for a civil injury done to the husband, and that no injury is done to the husband who has voluntarily relinquished his wife, and cannot therefore be said to be deprived by the act of adultery of her comfort and society: *Weedon v. Timbrell*, 5 T. R. 357.

The authority of that case has been much shaken, I think, by what has been said and decided in subsequent cases, though the principle of it was applied as late as the year 1873 by Sir James Hannen in *Malcolmson v. Givins*, reported in the *London Times* of 27th February, 1873 . . . and by the Court of Queen's Bench in this Province in 1869 in *Patterson v. McGregor*, 28 U. C. R. 280. . . .

An examination of the pleadings (in the last mentioned case) . . . shews, I think, that they went further than did the defence in *Weedon v. Timbrell*, and alleged substantially what is spoken of by Alderson, J., in *Winter v. Henn*, 4 C. & P. 494, as a total and permanent giving up by the husband of all advantage to be derived from the society of his wife.

The authority of *Patterson v. McGregor*, so understood, is, I think, recognized by Osler, J.A., in *Bailey v. King*, 27 A. R. 703, where he quotes, apparently with approval, the language of Alderson, J., in *Winter v. Henn*. . . .

[Reference to *Evans v. Evans*, [1899] P. at pp. 198, 201, 202; *Izard v. Izard*, 14 P. D. at p. 46; *Gardner v. Gardner*, 17 Times L. R. 331; *Constantinidi v. Constantinidi*, [1903] P. 246.]

If we were at liberty to deal with the case at bar on principle and unfettered by authority, I should be prepared to hold, in accordance with the view of the dissenting Judge in *Patterson v. McGregor*, and for the reasons given by him as well as those of Sir Francis Jenne in *Evans v. Evans* and of Mr. Justice Gorell Barnes in *Gardner v. Gardner* . . . that the husband does not forfeit his right to maintain such an action as this by any act or misconduct of his own not amounting to connivance at or consent to his wife's adultery, and that no man can justify himself, when living with another's wife against her husband's consent, by setting up, as an absolute bar and answer to the husband's complaint, that the law can give him no redress because he has totally and permanently given up her society.

We are, however, I think, bound by what was decided in *Patterson v. McGregor*, and must follow it, leaving plaintiff, if he is so minded, to challenge the correctness of the decision in a Court which has the power to overrule it.

Having come to this conclusion, it follows that we must hold that my brother Anglin, in telling the jury, as he did, that, if they came to the conclusion that, before the adulterous intercourse between defendant and plaintiff's wife began, plaintiff had totally and permanently given up all the advantage to be derived from the society of his wife, he was not entitled to recover, rightly directed them.

I come next to the ground taken by defendant's counsel as to the improper reception of evidence.

The evidence which plaintiff was permitted to give, notwithstanding objection to its admissibility, was of rumours of various acts of infidelity committed by his wife with defendant long before they went through the form of marriage at Rochester. My learned brother Anglin admitted the evidence because, in his opinion, though otherwise it would not have been admissible, defendant's counsel "had opened the door" for its admission by asking plaintiff on cross-examination the following questions:—"You heard he (defendant) was paying some attentions to your wife?" "Did you ever go to him and tell him she was your wife?" "Did you write to him and tell him that she was your wife, and that you did not want him to have anything to do with her?"

Plaintiff had stated in his examination in chief, in answer to questions put to him (apparently without objection), that he had heard his wife's name connected with some person "along about the year 1896 or 1897;" that he had heard

it connected with defendant; that he heard it from more than one source; that the rumours were persistent; and that he thought they increased rather than diminished.

I am unable to understand how anything that was said or done by defendant's counsel opened the door to the admission of evidence of the particulars of what plaintiff had heard as to the relations between his wife and defendant. It was hearsay evidence, pure and simple, and not within any exception to the general rules of evidence that I know of.

It is true that the learned Judge warned the jury that nothing was proved by this testimony, and that they could not base upon it any finding against defendant, but still the testimony was given, and it is impossible to say that . . . it . . . did not work a prejudice to defendant affecting the result of the trial.

I am also of opinion that, if the charge . . . is to be taken to mean that, upon the testimony which was given as to the intercourse between defendant and plaintiff's wife, prior to their going through the form of marriage at Rochester, the jury might infer that defendant had been guilty of adulterous intercourse with plaintiff's wife, the jury were misdirected.

There was not, in my opinion, any reasonable ground for suspecting, much less for finding as a fact, that improper relations existed between defendant and plaintiff's wife before the marriage ceremony. . . . It would, in my opinion, be intolerable if a jury were permitted, upon evidence such as was relied upon to prove adultery before the Rochester marriage took place, to fasten guilt upon plaintiff's wife.

As put by Mr. Bishop in his work on Marriage, Divorce, and Separation, vol. 2, sec. 1370, "Every act of adultery implies three things, the disposition in each of the two minds of two participants and the opportunity . . . But one alone amounts to nothing, and two together without the third are entirely inadequate." Granting that there was the disposition on the part of defendant and the opportunity, there was absolutely no evidence of the third—the disposition on the part of plaintiff's wife—but, in my opinion, there was no reasonable evidence of any one of the three. . . .

— From all that appears, the parties who are sought to be incriminated in this case, though by their cohabitation they have been guilty of adultery in the eye of the law, believed themselves to be free to marry. . . . The case should have been absolutely and entirely withdrawn from the jury so far

as it rested on the charge of adultery committed before the marriage ceremony was gone through at Rochester. . . .

[Reference to remarks of Lord Kenyon in *Weedon v. Timbrell*, 5 T. R. 357; *Frank v. Carson*, 15 C. P. 135; *Davidson v. Davidson*, 1 Deane Ecc. R. 132.]

Upon the question of damages: in an action of this character a very strong case must, no doubt, be made out to justify the Court's setting aside the verdict of a jury on the ground of excessive damages, but upon that ground also I think that this verdict must be set aside, for I am unable to understand how any twelve jurymen, acting reasonably, could upon the facts of this case have reached the conclusion that plaintiff was entitled to the sum which has been awarded to him as compensation for the loss which he sustained by the wrongful act of which defendant has been guilty. . . .

[Reference to *Izard v. Izard*, 14 P. D. at p. 47.]

The amount of the damages to be awarded was, no doubt, very largely in the discretion of the jury, and the Court would not be justified in setting aside the verdict merely because its own view did not accord with that of the jury on the question of damages; but in this case, in my opinion, the damages are so out of proportion to what appears to me would have been full compensation to plaintiff, that I am forced to the conclusion that, notwithstanding the direction of the learned Judge as to the true measure of damages, and his warnings as to what were not proper matters to be considered in assessing them, they have disregarded his instructions, and have sought to punish defendant for his conduct as they viewed it, and to discourage by their verdict attempts on the part of persons wishing to throw off the yoke imposed upon them by the marriage tie, to get rid of that yoke by resorting to means not recognized by the laws of this country as proper to be taken or effectual to accomplish the end they have in view. . . .

I have not overlooked what was said by plaintiff as to his having made up his mind when he heard the rumours which he said came to his ears of the improper relations said to subsist between his wife and defendant, to abandon his wife. Standing alone and unqualified, that admission would, in the view I have taken as to the law, be fatal to plaintiff's case; but, taking his evidence altogether, that admission was qualified, and perhaps the fair result of his evidence is that, having heard these rumours, and believing his wife to have been guilty, he was forced to abandon the hope which he had before entertained that his wife would yet repent and give

the explanation which he had demanded from her, and so a way be opened for a reconciliation between them and her return to him.

I have, therefore, though not without some hesitation, reached the conclusion that the case could not properly have been entirely withdrawn from the jury.

Order for new trial; costs of last trial and of this appeal to defendant in any event unless otherwise ordered by the Judge at the ultimate trial.

TEETZEL, J., concurred in the result arrived at by the Chief Justice.

MACMAHON, J., was of opinion, for reasons given in writing, that, on the ground of plaintiff's expressed intention to abandon his wife and his conduct for ten years in his actual abandonment of her, there was no case to go to the jury, and that the action should be dismissed with costs.

MEREDITH, C.J.

JULY 16TH, 1904.

CHAMBERS.

RE GRAHAM.

Will—Bequest to Charity—Misnomer—Cy Pres Doctrine—Equal Division among Charities nearly Answering Description.

Summary application by executors under Rule 938 for the determination of a question arising on the will of Hester Graham, deceased. The paragraph of the will upon which the question arose was as follows: "I give and bequeath to the Widows and Orphans Home at Toronto the sum of \$500." There was not at the time of the application, and as far as appeared never had been, in Toronto any charity answering to the name and description which the testatrix employed, but there were several charities in Toronto which were for widows or orphans or both and provided homes for them, and all the claimants were charities of that character.

W. S. Ormiston, Uxbridge, for executors.

R. J. Gibson, for residuary legatee.

H. Cassels, K.C., for the Old Folks' Home.

W. A. Baird, for the Aged Women's Home..

H. W. M. Murray, K.C., for the Protestant Orphans' Home.

J. T. Small, for the Church Home for the Aged.

MEREDITH, C.J.—It is impossible to say that any one of the claimants is the object of the bounty of the testatrix, but, according to the principles upon which the Court acts in such cases, the legacy does not therefore lapse, and the fund must be applied *cy près*. An equal division among the claimants of the fund, or what little will remain of it after paying the costs, would seem to me a proper application of it. Order accordingly. Costs of all parties out of the fund, and the division will be of what remains.

MEREDITH, C.J.

JULY 16TH, 1904.

TRIAL.

BROWN v. DULMAGE.

Sale of Goods—Contract—Terms—Rescission—Resale of Goods by Vendor—Repudiation—Evidence—Amendment.

Action to recover \$1,000 and interest. Plaintiff alleged that he entered into an agreement with defendant to purchase from him a stock of dry goods, clothing, and other merchandise, and shop fixtures, contained in a shop at Wingham; that it was one of the terms of the agreement that if, upon stock being taken, its value exceeded \$7,000, the agreement was not to be binding; that he paid to the defendant \$1,000 on account of the purchase money; that upon stock being taken the value was found to exceed \$7,000; that he thereupon rescinded the contract, and gave notice to defendant that he had done so, and demanded the return of the \$1,000 which he had paid; but defendant refused to repay it.

The agreement was in writing, dated 28th May, 1903. Its material terms were as follows:—"Stock, fixtures, etc., in the Kent block to be sold at 40 cents on the dollar invoice price—any dispute to be referred back to the stock sheet. Deposit to be \$100. If stock exceeds \$7,000 balance to rated (sic) at 30 cents on the dollar. \$2,000 cash deposit on completion of stock taking. Balance in two and four months equal notes. It stock exceeds \$7,000, deal may be declared off."

It appeared from the evidence that when the stock was taken its value was found to be \$7,051, and it was upon this excess of \$51 that plaintiff claimed to be entitled to declare the "deal off."

F. E. Hodgins, K.C., and D. S. Storey, Midland, for plaintiff.

W. A. Boys, Barrie, and R. H. Holmes, Wingham, for defendant.

MEREDITH, C.J.—I held at the trial that plaintiff had elected not to avail himself of the right which the agreement gave him to declare the "deal off" if the value of the stock should be found to exceed \$7,000, and reserved judgment as to the effect of this finding upon plaintiff's right to recover.

It appeared further in evidence that after plaintiff had written to defendant declaring the "deal off" and demanding the return of the \$1,000, defendant, after some correspondence with plaintiff, in which he took the position that plaintiff was bound to complete the purchase and insisted upon his doing so, gave notice to plaintiff of his intention to sell the goods, and that he would hold him responsible for all loss and damage which defendant might sustain "under the sale, together with all charges for storage."

Plaintiff having paid no attention to this notice, defendant, on the day fixed for the sale to take place, put up the goods for sale by public auction, but was unable to sell, because there were no bids, and he formally bid in the goods himself, not intending, as I find, to buy them, but because he believed that to be a formality necessary to be gone through. After this attempted sale, defendant proceeded to sell the goods by retail "over the counter," with the result that the net proceeds will fall considerably short of satisfying what remains due of the purchase money.

The mode of selling which defendant adopted was, as I find, a reasonable and practically the only one open to him, and that which was calculated to realize the best price for the goods.

My findings are conclusive against plaintiff's right to recover in this action.

It was urged, however, on the part of plaintiff, that before he attempted to call the "deal off" defendant had repudiated the contract, and that the action was sustainable on that ground.

The alleged repudiation consisted in defendant having written to plaintiff asking for the name of his indorser for the promissory notes which plaintiff was to give for the unpaid purchase money, and saying that he must have negotiable paper.

Defendant did not say that he must have indorsed paper; his statement was that he must have negotiable paper, meaning, as the context shews, paper that he could discount at a bank, and he expressly says that if the bank will take defendant's paper without an indorser "it will be all right." In the next place, in order to determine whether there has been a repudiation, the question to be considered and determined is not whether the conduct of defendant was inconsistent with the contract, but whether his conduct was really inconsistent with an intention to be bound any longer by the contract; and the answer to the question, on the facts of this case, should be that defendant's conduct was not of the latter character; and further that plaintiff did not act upon what defendant did and elect on account of it not to perform the contract on his part.

It was also urged that the resale of the goods by defendant was not warranted, and an amendment was asked to enable plaintiff to set up a new case based upon that view.

It would, I think, serve no good purpose to allow such an amendment to be made, as I would allow it only on the terms of plaintiff paying the costs of the action up to the present time; and it is, I think, the better course to dismiss this action without prejudice to any action which plaintiff may choose to bring based upon the alleged wrongful act of defendant in selling the goods, or for an account of the proceeds of the sale . . . ; and the action will, therefore, be so dismissed, and the dismissal will be with costs.

I must not be taken to indicate that, in my opinion, any such action, on the facts of this case, is maintainable.

Moss, C.J.O.

JULY 16TH, 1904.

C.A.—CHAMBERS.

SCOTT v. TOWNSHIP OF ELLICE.

*Appeal—Court of Appeal—Leave—Special Circumstances—
Absence of.*

Motion by plaintiff for leave to appeal from order of a Divisional Court, ante 38, dismissing appeal by plaintiff from

judgment of FALCONBRIDGE, C.J., 2 O. W. R. 880, dismissing the action.

R. S. Robertson, Stratford, for plaintiff.

G. G. McPherson, K.C., for defendant corporation.

J. C. Makins, Stratford, for other defendants.

MOSS, C.J.O.—A perusal of the papers and further consideration confirm the opinion I formed during the argument of this motion that plaintiff has not been able to bring this case within the terms of sec. 77 (4) of the Judicature Act. His pecuniary interest is admittedly of the most trifling nature. It is not a case of conflicting decisions of the High Court or Judges thereof. And no other sufficient special reasons for treating the case as exceptional and allowing a further appeal have been shewn.

It was said that the Judges of the Divisional Court had misapprehended the facts with regard to plaintiff's status, that they had overlooked the fact that at the date of the passing of the by-law in question he was tenant of lot No. 9 in the 6th concession of Ellice, and that as such tenant he had a locus standi to impeach the by-law. But this tenancy had terminated before he commenced this action, and but for his tenancy under Mrs. Drown he would have ceased to be a ratepayer altogether. When he instituted these proceedings his sole right as former tenant of lot No. 9—if he had any—was to recover back from the township the few cents of taxes he had paid in excess of what he would have been obliged to pay but for the by-law, and for this he could have sued in the Division Court. Besides, I am not satisfied that, either at the trial or before the Divisional Court, he relied upon his position as tenant of lot No. 9. The written arguments and the notice of appeal to the Divisional Court appear to deal only with his position as Mrs. Drown's tenant. There does not seem to have been any misapprehension on the part of the Court of plaintiff's position.

The case seems to be the not uncommon one of a party who has deliberately selected his appellate tribunal remaining unconvinced notwithstanding the adverse decision of the forum of his choice. Plaintiff has the opinion of two Courts against him, but that of itself is no good reason for a further appeal. In other respects the case presents no features of sufficient importance to take it out of the general rule of the statute.

Motion refused with costs.

ANGLIN, J.

JULY 16TH, 1904.

CHAMBERS.

RE CONNELL.

*Lunatic—Petition for Declaration—Evidence—Interests of
Alleged Lunatic.*

Petition for an order declaring Thomas Connell a person of unsound mind.

W. E. Middleton, for petitioner.

G. H. Watson, K.C., for the lunatic.

ANGLIN, J.—Martin Connell, a brother of the alleged lunatic, petitions to have him declared a person of unsound mind and for the appointment of a committee of his person and estate. Upon the argument, counsel for the petitioner pressed for an order directing the trial of an issue to determine the question of Thomas Connell's sanity or insanity. Mr. Watson, on the other hand, urged that the petition should be dismissed upon the material now before the Court. Neither counsel favoured the idea of having the alleged lunatic examined by a physician to be appointed by the Court. Unless, upon the present material, I should think it proper to direct the issue he desires, Mr. Middleton requested an enlargement to enable him to cross-examine the deponents who have made affidavits in opposition to the petition. Finally both counsel agreed in requesting me to read the material filed and to make such order or direction as I should deem proper, Mr. Middleton, however, not waiving his request for an enlargement.

I have read all the affidavits. Thomas Connell is an old man about 80 years of age, suffering from the effects of a recent stroke of paralysis. There may be some doubt as to his sanity and as to his ability to manage his own business. Upon the present material the weight of testimony upon the question seems against the petitioner. If I thought it in the interest of Thomas Connell to do so, I should direct further inquiry either by the trial of an issue or examination by independent physicians. I do not think I should do either.

Mr. Middleton candidly stated that the danger against which the petitioner seeks to guard is some disposition of his brother's property in the interest of other members of the

family. Reading the material in the light of this statement, I fear that this is a case in which "the applicant lays more stress on the property than on the person of the lunatic." Thomas Connell is living with a niece with whom he has made his home for many years. There is not a scintilla of evidence that he is not well treated and cared for—better in all probability than he could be in any public institution. "Upon the applicant's own materials, I should say no case is made out for interfering with the custody of the alleged lunatic."

Neither is any case made out for present interference on the ground that the care or management of the property of Thomas Connell requires the appointment of a committee of his estate.

Dealing with this matter solely with a view to doing what seems best for the welfare of Thomas Connell, in my opinion further proceedings should not be permitted upon this petition. The only purpose of the cross-examinations proposed by the petitioner is, if possible, to establish the insanity of his brother. Even if this were made quite clear, I should feel bound to refuse this application. This is not the proper means to employ in order to pave the way for impeaching any disposition already made or which may hereafter be attempted of the property of this alleged lunatic.

As the whole application seems ill-founded and not in the interests of the only person whose welfare is to be considered in dealing with it, I feel bound now to dismiss it with costs.

I think this case is governed by the decision of the learned Chancellor in *Re Clarke*, 14 P. R. 370.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING SEPTEMBER 10TH, 1904.)

VOL. IV. TORONTO, SEPTEMBER 15, 1904. No. 3

ANGLIN, J. .

JULY 18TH, 1904.

WEEKLY COURT.

FALLER v. AYLEN.

Arbitration and Award—Patent Act of Canada—Appointment of Arbitrators—Deputy Commissioner of Patents—Review—Injunction—Powers of Court—Defendants Evading Service.

Motion by plaintiff to continue an injunction granted by one of the local Judges at Ottawa restraining defendants, arbitrators under the Patent Act of Canada, from proceeding to make an award. The statute, sec. 19, sub-sec. 3, reads: "If there are more than two conflicting applications" (which was this case) "and if the parties do not all unite in appointing three arbitrators, the commissioner, or the deputy commissioner, or person appointed to perform the duty of that officer, may appoint the three arbitrators for the purposes aforesaid."

The deputy commissioner caused notices to be sent out calling upon the three applicants, Faller, the American Machine Telephone Co., and Callender, to name arbitrators. The notice to Faller and the telephone company reached these claimants; that intended for Callender was alleged to have been misdirected and not to have reached him. Upon the telephone company intimating to the deputy commissioner that they could not in any event or under any circumstances unite with the other claimants in choosing a board of arbitrators, the deputy commissioner proceeded, without further notice to Callender, himself to appoint the defendants as the three arbitrators under the provisions of the statute. It was this act which was impugned by plaintiff as unlawful and beyond the power of the deputy commissioner, upon the ground that his right of appointment

could only arise upon failure of the applicants, after due notice to all (this Callender never had), to unite in appointing a board.

F. A. Magee, Ottawa, for plaintiff.

D. L. McCarthy, for defendants.

H. Fisher, Ottawa, for the American Machine Telephone Co.

ANGLIN, J.—The objection to the exercise of his statutory power by the deputy commissioner is not well taken. The Act confers this power "if the parties do not all unite." They had not in fact united. As to the sufficiency of the opportunities had by the applicants, or any of them, to unite in appointing three arbitrators, as to the adequacy of any notice given them, as to the necessity, the propriety, or the futility of giving any such notice (none being prescribed by the statute), and as to the character and quantum of evidence that the applicants have not united, or will not unite, in naming a board of arbitration, upon which he should act, in my opinion "the commissioner or the deputy commissioner or person appointed to perform the duty of that officer," is, by the statute, alone authorized to adjudicate and decide. His determination that the conditions exist in which he should proceed to exercise his power of appointment is not, I think, open to review upon motion for prohibition or injunction (Re Bell Telephone Co., 9 O. R. 339, 345; Re Bell Telephone Co., 7 O. R. 605, 614); assuming that this Court has jurisdiction to entertain such an application, which is open to grave question. (In re Bell Telephone Co., 9 O. R. 339, 346.) After the granting of the local Judge's order and before service upon them, the arbitrators had actually completed and published their award and are now *functi officio*. The injunction, if continued against them, would be inoperative because that had been accomplished which plaintiff sought to enjoin.

It is charged that defendants, knowing of the injunction, deliberately secluded themselves to avoid service of the order, and complete their arbitral functions. If the jurisdiction to enjoin existed, this would be a serious charge. It rests upon the affidavit of William Johnson, who is contradicted, upon most material allegations, by Mr. William Joseph Lynch, the chief clerk of the patent branch of the department of agriculture. The arbitrators upon oath severally deny knowledge that any order had been made enjoining them from proceeding. I cannot find that they wil-

fully disobeyed the order of the Court: Ex p. Langley, 13 Ch. D. 110.

Motion refused with costs to defendants in any event.

MACMAHON, J.

JULY 20TH, 1904.

TRIAL.

ELGIN LOAN AND SAVINGS CO. v. LONDON GUARANTEE AND ACCIDENT CO.

Principal and Surety—Guarantee Policy—Fidelity of Manager of Loan Company—Misappropriation of Moneys—Release of Surety—Insufficient Audit—Change in Duties of Manager.

Action upon a guarantee policy issued in favour of the plaintiffs the Elgin Loan and Savings Co., whereby the defendants agreed to make good, to the extent of \$2,500, any loss sustained by reason of the embezzlement of money by George Rowley, the manager of the loan company, during the continuance of the agreement of guarantee. Plaintiffs (the Elgin Loan and Savings Co., a Provincial corporation, the Elgin Loan and Savings Co. Limited, a Dominion corporation, and the London and Western Trusts Co., the liquidators of the two companies) alleged that Rowley during the continuance of the agreement embezzled large sums of money, the property of the Elgin Loan and Savings Co., and claimed \$2,500. The defendants alleged that there was no proper audit of Rowley's accounts, as required by the terms of the policy, and that a change was made in the duties of Rowley without notice to defendants.

W. K. Cameron, St. Thomas, and C. F. Maxwell jun., St. Thomas, for plaintiffs.

J. B. Clarke, K.C., and T. W. Crothers, St. Thomas, for defendants.

MACMAHON, J.—The guarantee of defendants began in 1897, and was renewed from year to year, the last renewal receipt being dated 27th February, 1903. Rowley was manager of the Elgin Loan and Savings Co. from its formation in 1879 until its failure in June, 1903. There was no other employee of the company, and he kept the books, received and paid out all the moneys, and made the deposits in the bank. He began misappropriating the moneys in 1888, and kept a private ledger in which he entered the moneys misappropriated from the moneys received from the depositors; and he stated that in 1897 his defalcations amounted

to \$50,000, and when the company went into liquidation his embezzlements amounted to \$187,620. Rowley was implicitly trusted by the directors, and after beginning to embezzle he always objected to having an assistant in the office, telling the directors he was quite capable of doing all the business himself. He never went out to lunch, leaving a director in the office, for fear a depositor might come in with his pass-book, and the result might be the discovery of a defalcation. The private ledger kept by Rowley for his own purposes contained the correct accounts of the depositors whose moneys he had embezzled, and therefore corresponded with the depositors' pass-books, while the company's ledger contained the falsified accounts of these depositors. He was never for a moment absent from the office on any occasion while the books were being audited. The auditors had access to all the books in the company's office, and one of the questions was as to whether these alone enabled the auditors to make a thorough and systematic audit. One of the auditors of the Elgin Loan and Savings Co. testified that, while the books kept by Rowley were in perfect order, what struck him was that the auditors had to rely entirely on the cash book for the receipts of cash, as there were no deposit slips, and unless the auditors had the depositors' pass-books there was nothing to check by. This condition of affairs caused him to make inquiries, and he discussed with the president of the company the question of Rowley's receipts, and whether the auditors should go to the trouble of calling in the pass-books or sending out a slip to each customer shewing how his account stood in the books. To this the president replied that, as no company in St. Thomas had adopted that course, the auditors were only to be responsible for their audit from the cash book. The Loan Companies Act, R. S. O. 1897 ch. 205, sec. 92, requires that two or more auditors shall be chosen by the company's stockholders, who shall audit the books, accounts, and vouchers for the year then current. The guarantee policy contained this recital: "Whereas George Rowley, of St. Thomas, in the Province of Ontario, hereinafter called the employee, has been appointed manager in the service of the Elgin Loan and Savings Co., hereinafter called the employer, and has applied to the London Guarantee and Accident Co. Limited, hereinafter called the company, for the grant by them of this agreement; and whereas the employer has delivered to the company certain statements and a declaration setting forth, among other things, the duties and remuneration of the employee, the moneys to be intrusted to him, and the checks to be kept upon his accounts, and has

consented that such declaration, and each and every the statements therein referred to or contained, shall form the basis of the contract hereinafter expressed to be made, but this stipulation is hereby limited to such of said statements as are material to this contract. It was not contended that the application of Rowley contained any untrue statements. Defendants contended that the answers by the "employer" (the loan company) to the questions submitted and the declaration made by the president, which it was agreed should form the basis of the contract of guarantee, came under sec. 144 (1a) of the Insurance Act, R. S. O. 1897 ch. 203.

That can not be, because that sub-section applies only to the "application of the assured," and by the interpretation clause of the Insurance Act, sec. 2, sub-sec. 45, "the assured" means "the person whose property, life . . . fidelity, or insurable interest is insured." The statements and declaration sought to be brought by defendants under sub-sec. 1 (a) are those of the "employer," and defendants can rely only on such statements and declarations as are set out on the face or back of the contract. One of the statements alleged to be so set out in the recital is as to "the moneys to be intrusted to him and the checks to be kept on his accounts." In answer to question 6.—"Is he allowed to pay out of the cash in his hands any amounts on your account, and, if so, are those payments previously authorized and subsequently audited, and by whom?"—said: "yes; handles all the cash; all withdrawals from the bank require the joint cheque of president and manager." "Q.—How often do you require him to pay over to you, and is he then allowed to retain a balance in hand? If so, how much? And do you see that he has that amount in his possession? A. All cash excepting very small amounts deposited in the bank daily. All cash and bank balances checked by the auditors." The evidence was that the president signed large numbers of cheques in the cheque book, which was left in Rowley's control, and in one instance referred to in the examination for discovery of John S. Moore, the manager of the liquidators, Rowley had on 30th October, 1896, drawn a cheque payable to Agnes A. Laidlaw for \$22.50, and debited her in the company's ledger with \$2,250, and the auditors, if they checked her account with the cash book, must have found \$2,250 debited to her there, and a like sum on the counterfoil of the cheque book, but they could not have required the cheque, which had been returned from the bank, to be produced, or checked the entry in the cash book with the bank book, or the fraud would have been discovered. It is literally true that the moneys withdrawn from the bank required the joint

cheque of the president and the manager, but the moneys might as well have been withdrawn on the cheque of the manager alone, when the president signed large numbers of cheques in advance, to be issued by the manager without any supervision or inquiry as to whom or for what sums, or on what account, the cheques were made payable. The president knew that such a course when carried out was a complete check upon the manager, and that the statement would be so understood by the defendant company, that he, the president, supervised the withdrawal of the moneys from the bank and signed the cheques after being satisfied that the payment was for a proper amount and on a proper account. No assurance company would think of issuing a guarantee for the manager of a company if it were known that such a lax system as was disclosed at the trial prevailed. . . .

I must find that there was no proper checking by the auditors. One of them said there could be no proper checking of the cash without deposit slips or the pass-books; and in order to make a proper checking and so secure a satisfactory audit of the books, he felt the necessity of having the materials . . . essential to a thorough and proper audit: see the views expressed by Mr. Dicksee, F.C.A., on Auditing (2nd ed.) p. 142. . . .

The statements of the president of the Elgin Loan and Savings Co. were untrue, and were material to the contract; and the recital in the contract states that the stipulation is therein limited to such of said statements as are material to the contract, which is a sufficient compliance with sec. 141, sub-sec. 2, of the Act. See *Village of London West v. London Guarantee Co.*, 26 O. R. 520; and judgment of Lindley, L.J., in *re London and General Bank* (No. 2), [1895] 2 Ch. at p. 682. What appears in the recital is not a setting out of the terms and conditions in full on the face of the contract, as required by sec. 144 (1) of the statute. But I have dealt with the statements and declaration of the president of the loan company for the purpose of shewing what is contained therein, and I have also considered the question as to the sufficiency of the audit, so that if, on appeal, the Court should reach another conclusion as to the effect of the recital, it would be possessed of a finding on the question of the audits.

A proviso in the contract was that: "This agreement is entered into on the condition that the business of the employer shall continue to be conducted and the duties . . . of the employee shall remain in accordance with the statements and

declaration hereinbefore referred to." The business of the "employer" and the duties of the employee were set out in the recitals to the agreement, and it was therefore not necessary that reference should be made in the proviso to the statements and declarations. In October, 1902, the Elgin Loan and Savings Company procured a Dominion charter, which enabled them to purchase stocks, but, as they had no license from the Province to carry on such a business, the company, in March, 1903, authorized Rowley to use the company's moneys in the purchase of stocks (principally Dominion Coal and Dominion Steel) in his own name, and they then took a mortgage from him on the equity in certain real estate he owned, and transferred the stocks as collateral to the loan, this being the method devised to circumvent what would otherwise have been considered an illegal act upon the part of the directors of the company. The equity in the real estate was insignificant, while the stocks transferred as collateral were for large sums.

There was a change of the business from that of a loan company to that of buying and selling stocks, which largely increased Rowley's duties and responsibilities, and withdrew him from his legitimate duties as manager of the loan company; and he (Rowley) stated that his defalcations largely increased during the two years preceding the failure of the loan company, and it may be that the change largely increased the opportunities for peculation. This change in the business of the company was contrary to the express terms of the guarantee, and rendered it impossible for the plaintiffs to recover on it. Judgment for defendants dismissing the action with costs.

ANGLIN, J.

JULY 23RD, 1904.

CHAMBERS.

RE COHEN.

Extradition—Receiving Stolen Goods—Offence under Laws of Foreign State—Evidence before Extradition Commissioner—Evidence on Review by Habeas Corpus—Weight of Evidence—Guilty Knowledge of Accused—Inference from Conduct—Extradition Act, 1886—Interpretation Clause—Subsequent Treaty—"Receiving any Money, Valuable Security, or other Property"—Ejusdem Generis Rule—Construction of Treaty—Discharge of Prisoner.

Motion by Harris Cohen for a writ of habeas corpus and for his discharge from custody under a committal by the Judge of the County Court of Wentworth, acting as an

extradition commissioner, for extradition to the State of Illinois to answer a charge of "unlawfully receiving and having in his possession certain goods and chattels well knowing the same to have been theretofore stolen."

C. A. Masten, for the prisoner, contended: (1) That no offence was proven under the laws of the State of Illinois. (2) That the evidence did not warrant commitment. (3) That the offence charged was not included in the Extradition Act.

S. F. Washington, K.C., for private prosecutors.

ANGLIN, J.—I am not free to give effect to any personal opinion I may entertain in regard to the first point raised by Mr. Masten; In re Murphy, 22 A. R. 386, is in this Court conclusive authority against this objection.

(2) The learned commissioner rejected the deposition of one McCarthy, on the ground that, though duly authenticated, it is not a "deposition or statement" within sec. 10 of R. S. C. ch. 142, adding these words, "I reserve leave to Mr. Washington to renew his application to have it taken in evidence before any Court on further motion herein." Such an application as the present is the only further motion which could have been contemplated. I am clearly of opinion that upon motion for habeas corpus or for the discharge of the prisoner, I cannot receive or consider any evidence except that upon which the prisoner stands committed: In re Parker, 19 O. R. 612-619. I have to determine whether upon that evidence he is legally committed for extradition.

The testimony received by the commissioner was, in my opinion, "legal evidence tending to attach criminality to the accused." Into the weight of that evidence, or even its sufficiency to sustain the charge, I should not here inquire: In re Weir, 14 O. R. 389-396; Ex p. Feinberg, 4 Can. Crim. Cas. 270, 272-3.

The objection taken by counsel for the prisoner to the legality of the evidence before the commissioner was that, as to the guilty knowledge of the accused, it consisted solely of his silence upon hearing statements involving his guilt, made by the thief, McCarthy. As proof of the facts stated by McCarthy, this evidence is per se valueless; as an acknowledgment by the accused, to be inferred from his conduct or silence, of the accuracy of the assertions made, the evidence is admissible: Regina v. Smith, 18 Cox 470; Regina v. Cox, 1 F. & F. 90; Regina v. Mallory, 15 Cox 458. The weight to be attached to it is wholly for the commissioner.

There was competent evidence upon which a magistrate might, in his discretion, commit for trial, as affording probable cause for believing the accused to be guilty. Moreover, there was, in the facts which transpired at the time of the arrest of the defendant, as deposed to by the officers, other evidence from which the commissioner might not unreasonably infer the scienter of the accused.

(3) Finally, the learned counsel for the prisoner argues that the charge laid is not within the Extradition Act. The schedules to our Acts of 1886 (R. S. C. ch. 142) and of 1889 (52 Vict. ch. 36) do not mention this crime, but by the interpretation clauses of the earlier statute "extradition crime . . . in the application of this Act to the case of any extradition arrangement, means any crime described in such arrangement, whether comprised in said schedule or not." The later Act is "to make further provision," etc. The "extradition arrangement" of 1890 with the United States of America, though made four years after our Extradition Act of 1886 was enacted, must, in my opinion, be deemed to be covered by the interpretation clause of that statute, and in that arrangement is comprised a crime described as "receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained." Any offence within this description is therefore within the Extradition Act of Canada.

Counsel for the prisoner, however, maintains that the words "other property," applying the maxim "*noscuntur a sociis*," must be restricted to things of the same type as "money and securities for money," citing *The Queen v. De Portugal*, 55 L. J. Q. B. 567. . . . This case goes far to establish the applicability to proper cases in extradition proceedings of the strict rule of interpretation generally acted upon in construing criminal statutes. The fair and liberal spirit with which we are told we should approach the construction of a treaty, "not labouring with eager astuteness to find flaws or doubtful meanings in its words" (see *Re Burley*, 1 C. L. J. N. S. 49, and *Regina v. Morton*, 19 U. C. R. at p. 20), must not induce the Court to extend its operation to crime not specified or expressed. Numerous other cases of restricted construction of similar general words are collected in . . . Stroud's *Jud. Dict.*, 2nd ed., pp. 1359-1366; Sutherland on *Statutory Construction*, pp. 351 et seq.; Maxwell on *Interpretation of Statutes*, 3rd ed., pp. 468 et seq.; Hardcastle's *Statute Law*, 3rd ed., pp. 190 et seq. . . .

[Reference to *Sandiman v. Breach*, 7 B. & C. 96; *Attorney-General v. Hamilton Street R. W. Co.*, 29 O. R. 49,

24 A. R. 170; *Clark v. Gaskarth*, 8 Taunt. 431; *Casher v. Holmes*, 2 B. & Ad. 592; *Radnorshire v. Evans*, 3 B. & S. 400; *Re Stockport Schools*, [1893] 2 Ch. 687; *Read v. Ingham*, 3 E. & B. 889; *Willis v. Thorp*, L. R. 10 Q. B. 383; *Powell v. Boraston*, 18 C. B. N. S. 175; *Lowther v. Earl Radnor*, 8 East 124; *Fletcher v. Lord Sondes*, 3 Bing. 501, 580.]

On the other hand, in numerous instances the Courts have seen fit to give generic words, following words more specific, a comprehensive meaning. The writers above named give many examples.

[Reference to *Regina v. Edmundson*, 2 E. & E. 77; *Regina v. Doubleday*, 3 E. & E. 501; *Young v. Grattridge*, L. R. 4 Q. B. 166; *Regina v. Shrewsbury*, 3 B. & Ad. 216; *Regina v. Payne*, L. R. 1 C. C. R. 27; *Regina v. Norris*, Russ. & R. 69; *Richmond Hill S. S. Co. v. Trinity House*, [1896] 2 Q. B. 134.]

In *Re Miller*, 61 L. T. 367, North, J., says. "You do not use the word 'other' unless there is some relation between the classes of things." And in *Leicester v. Brown*, 41 W. R. 78, Pollock, B., advances as a reason for holding the generic word to be of comprehensive meaning, the absence of the word "other." Sir Peter Maxwell speaks of "the restricted meaning which primarily attaches to the general word in such circumstances (p. 475); while Lord Esher in *Anderson v. Anderson*, [1895] 1 Q. B. 749, 753, says: "Prima facie you are to give the words their larger meaning."

As an instance of a notable modern application of an *ejusdem generis* construction by the highest Courts, indicating that in matters of a criminal character the pristine rigour of that principle of construction remains unimpaired, I would refer to *Powell v. Kempton Park Race Course*, [1897] 2 Q. B. 242, 257, 265-6, 275-6, 301, [1899] A. C. 143. The Supreme Court of Canada applied this rule recently in *O'Dell v. Gregory*, 24 S. C. R. 661. In a still later case, *Farquharson v. Imperial Oil Co.*, 30 S. C. R. 188, . . . the Supreme Court refused to apply this canon of interpretation.

Mr. Stroud . . . reaches this conclusion at p. 1360: "It is perhaps impossible to lay down any workable rule to determine which of these two interpretations the word should receive in any case not already covered by authority."

I have made an exhaustive search for some case in which the words "other property" have been interpreted following specific words in a statute, deed, or contract. There seems to be no such case in England or Ontario.

Seeking for other authority covering these very words, I find the following: *Hall v. Barker*, 74 Wis. 118, 127 . . . *Grissell v. Housatonic R. R. Co.*, 54 Conn. 447 . . . *People v. New York and Manhattan Beach R. W. Co.*, 81 N. Y. 565 . . . *First National Bank of Joliet v. Adam*, 138 Ill. 483. . . .

These are the only decisions I can find upon the interpretation of the words "other property," except when used in wills. So much do they depend upon the context and the object of the statutes or documents under discussion that, if binding as authorities, they would be by no means conclusive in the present instance.

It is an universal rule of construction that "all words of a written instrument shall, if possible, be given some effect, so that none will be void, superfluous, or redundant." Therefore general words must not be so restricted as to deprive them of all meaning. If the particular words preceding exhaust the type, the general words must receive a wider interpretation: *Fenwick v. Schmalz*, L. R. 3 C. P. 313, 315.

But can it be said that "money and valuable securities" comprise the entire genera or types of things to which they belong?

[Reference to *Rex v. Hill*, Russ. & Ry. 190; *Southcott v. Watson*, 3 Atk. 232; *Regina v. Yates*, 1 Moody 170; *Regina v. Tattock*, 2 Q. B. D. 157, 163, 166; *Barry v. Harding*, 1 Jo. & La T. 475; *Hopkins v. Abbott*, L. R. 19 Eq. 222.]

It would . . . appear (from these cases) that there are several other things (and there may be more) of a like type, which would not be held to be covered by the words "money, valuable security," and, in their application to these, the words "other property" may have the full effect intended by the treaty-makers. I cannot, on the ground that the specific words are exhaustive, refuse to apply the *eiusdem generis* rule.

This rule of construction is spoken of by Mr. Hardcastle (3rd ed., p. 191) as a "mere presumption in the absence of other indication of intention."

If we take the entire treaty and by a wider inspection of its scope endeavour to learn the intention of the high contracting parties, which, if ascertainable by a consideration of the object of the treaty, its whole scope and tenor, or other reliable indicia, must certainly govern its construction, the difficulty of refusing to apply the rule under consideration is increased rather than lessened.

The purpose of this convention was to extend the scope of the existing extradition arrangements between Great

Britain and the United States. With this object it introduced into the schedule of extradition crimes certain offences not before included, and amongst them the offence described as "receiving any money, valuable security, or other property," etc. The expressed purpose of the convention has been attained whatever interpretation is given to the words "other property" in this particular clause.

"'Property' is the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have:" per Langdale, M.R., in *Jones v. Skinner*, 5 L. J. Ch. 90.

In construing wills, only a very clear context, leaving no room to doubt the testator's intention to restrict its meaning, is permitted to deprive this word of its comprehensiveness: *Robinson v. Webb*, 17 Beav. 260; *Mullaly v. Walsh*, 3 L. R. Ir. 244; *Gover v. Davis*, 29 Beav. 222.

The nature of the subject dealt with does not admit of its widest signification, which would include real estate, etc., being here given to this word. How far is its comprehensiveness to be restricted?

It is, perhaps, difficult to conceive why the criminal receiving stolen money, valuable securities, and things of that type, should be extraditable rather than the receiver of other kinds of good or chattels. And yet every offence is not an extradition crime. The framers of the treaty, however, may well have regarded the dealer in stolen money and securities as a more dangerous kind of offender—a criminal usually on a larger scale—than the ordinary, commonplace receiver of stolen goods. We cannot attribute to the framers of this treaty ignorance or forgetfulness of a rule of construction so well established in the jurisprudence of both countries. . . .

[Reference to *Thames and Mersey Marine Ins. Co. v. Hamilton, Fraser, & Co.*, 12 App. Cas. at p. 490.]

If Parliament is presumed to legislate in the light of decided cases, and legislative language is to be taken as intended to be construed by the established canons of interpretation; if ordinary persons are presumed to contract with a knowledge of the law bearing upon the language they employ; a fortiori should the representatives of sovereign states, making solemn treaties of such vast moment . . . , be credited with knowledge and recollection of the ordinary canons of construction, and of the fact that courts of justice are accustomed to presume that the application of such rules was contemplated when language within their purview is deliberately employed. Adapting the language of Lindley, M.R., "I cannot conceive why the

treaty-framers should have taken the trouble to specify in this section such special things as 'money' and 'valuable securities' except to shew the type of thing which they were referring to; and, in my opinion, 'other property' must be taken to mean other property of that type." In re Stockport Schools, [1898] 2 Ch. 687, at p. 696. Had they meant the general words to be applied without restriction, they would have used only one compendious expression: *Rex v. Wallis*, 5 T. R. 379.

Notwithstanding the warning of an eminent Judge that "in denying to any word (or phrase) its known and natural meaning we ought to be quite sure that the intention was, in the particular case, not to give it that meaning" (*Tisdell v. Combe*, 7 A. & E. 796, per Denman, C.J.), the absence of any merit in the case of the prisoner, and the fact that I cannot say that I am absolutely certain that I am correctly interpreting this important treaty clause, I feel bound to give the prisoner the benefit of the best opinion I have been able to form.

I would, if a Divisional Court were sitting, gladly avail myself of the provision enabling me to refer this motion to it: *Jud. Act. sec. 67 (1b)*. But no such Court will be held for two months.

Having, after the fullest reflection, though not without much hesitation, reached a conclusion that the offence with which Cohen is charged is not an extradition crime under the existing convention between Great Britain and the United States, I feel that I am bound to take the responsibility of granting the writ of habeas corpus for which he asks and of ordering his discharge from custody.

"So long as there is an extradition law under which a criminal whose extradition is sought has rights to be observed here, he is entitled to have those rights administered by our Courts:" per Osler, J., in *Re Parker*, 9 P. R. at p. 335.

OSLER, J.A.

JULY 23RD, 1904.

CHAMBERS.

RE PANTON AND CRAMP STEEL CO. AND NATIONAL TRUST CO.

Company—Transfer of Shares—Refusal to Register—Temporary Closing of Transfer Books—Meeting of Shareholders—Mandamus—Absence of Statutory Authority.

Motion by Panton to compel the trust company to record a transfer to Panton of 4 shares of common stock in the steel company. The transfer was in order and would have

been recorded by the secretary of the trust company but for the instructions they received from the secretary of the steel company on the 21st July not to do so until after 30th July.

The motion was heard by OSLER, J.A., in Chambers, at the request of a Judge of the High Court.

F. Arnoldi, K.C., for applicant.

W. H. Blake, K.C., for the companies.

OSLER, J.A.—The instructions and the resolution of the steel company on which they were based were evidently given and passed under a misapprehension as to the company's legal right. The transfer being in order and the stock paid in in full, the company had no discretion to exercise in the matter, or option but to comply with the demand of the transferee to record the transfer. It may be convenient that for a brief period before the annual or a special meeting of shareholders transfers should not be recorded so as to avoid confusion, or rather perhaps some inconvenience in ascertaining who are shareholders entitled to be present or represented at the meeting, but the power to impose this restriction upon sellers and purchasers of shares has not been conferred upon the company, nor has any authority been referred to which might indicate that, in the absence of statutory authority, the company have any discretion in this respect. The trust company are still the general agents of the steel company for the purpose of recording transfers, under the terms of a somewhat formal and elaborate agreement, and the only reason assigned for passing the resolution resting upon a misapprehension of the legal rights of the steel company, the reservations mentioned in the agreement must be read as limited to instructions and reservations which they can legally impose, or in respect of rights which they could themselves exercise in reference to such a transfer as that in question.

Order made as asked. Costs of the applicant and of the trust company to be paid by the steel company.

ANGLIN, J.

JULY 25TH, 1904.

CHAMBERS.

RE DEWAR AND DUMAS.

Landlord and Tenant—Overholding Tenant—Summary Proceeding to Recover Possession of Demised Premises—Overholding Tenants Act—Notice of Hearing—Appointment—Affidavit—Service—Irregularity — Waiver — Adjournment—Prohibition.

Motion by the tenant for prohibition to one of the junior Judges of the County Court of York to prohibit the issue

and enforcement of an order under the Overholding Tenants Act for delivery of possession by the tenant of the premises No. 220 Bleecker street, Toronto.

D. O. Cameron, for the tenant.

F. J. Roche, for the landlord.

ANGLIN, J.—It was objected by the tenant that the provisions of sec. 4 of the statute, requiring that to the notice in writing of the time and place fixed by the Judge for determining the landlord's right to an order for possession, to be served upon the tenant, "shall be annexed a copy of the Judge's appointment and of the affidavit on which the appointment was obtained and of the papers attached thereto," were not complied with. The notice was given on 6th June. The copy of the appointment was served on the same day, but apparently not annexed to the notice. The copy of the affidavit was not served at all prior to the return of the appointment on 10th June. On that day this objection to the proceedings was taken before the Judge of the County Court. Instead of issuing a new appointment and directing service of a fresh notice, etc., under sec. 4, the Judge adjourned the hearing of the case until 17th June, and directed that a copy of the affidavit be meantime served. This service was effected on 13th June. On 17th June, after some evidence had been taken, the matter was further adjourned to 24th June, when, after argument, an order in favour of the landlord was pronounced. The tenant was represented on 17th and 24th June by counsel, who cross-examined the landlord's witnesses and adduced evidence in answer.

If failure to serve a copy of the affidavit as required by sec. 4 were merely an irregularity, it was waived: *Smith v. Smith*, 17 N. S. Reps. 42. The County Court Judge is here exercising a statutory jurisdiction as *persona designata*. Section 5 gives him power to order a writ of possession to issue "if at the time and place so appointed the tenant, having been duly notified as above provided, fails to appear." In the absence of the tenant upon the return of the appointment, a strict compliance with the requirements of sec. 4 as to notice, etc., is essential as a condition precedent to the exercise of the power given by sec. 5. But, if the tenant appears at such time and place, the Judge shall, in a summary manner, hear the parties, etc. The contract between this provision for the case where the tenant attends and that made for the case of his non-appearance, indicates that it is only in the latter event that a strict compliance with the provision of sec. 4 is a pre-requisite of jurisdiction. Where the

tenant appears and takes advantage of an adjournment made for the express purpose of meeting his objection, and then takes the chance of an adjudication upon the merits by the County Court Judge, he has effectively waived what he has himself treated as merely the irregularity which it seems in fact to be. In the absence of an English or Ontario case in point, *Smith v. Smith* (supra), a decision of the Supreme Court of Nova Scotia, should be followed rather than the judgment of Dubuc, J., in *Carley v. Bertrand*, 5 *Western Law Times* 158, notwithstanding the closer similarity borne by the Manitoba statute to our own Act. Moreover, in view of *In re Warbrick and Rutherford*, 6 O. L. R. 430, 2 O. W. R. 961, it must be deemed doubtful whether prohibition should under any circumstances be granted before the writ of possession has actually issued.

Motion dismissed with costs.

ANGLIN, J.

JULY 25TH, 1904.

CHAMBERS.

EDWARDS v. COOK.

Summary Judgment—Rule 616—Pleading Disclosing no Defence—Motion for Judgment—Refusal—Discretion—Appeal.

Appeal by plaintiff from order of Master in Chambers dismissing plaintiff's motion for judgment under Rule 616.

C. A. Moss, for plaintiff, contended that the statement of defence raised matters which disclosed no answer to his claim.

W. H. Blake, K.C., for defendant.

ANGLIN, J.—Rules 261 and 259 afford appropriate methods for disposing of such questions; and, in view of their provisions, Rule 616 was not intended and should not be used to fulfil this office. *Mellor v. Sidebotham*, 5 Ch. D. 342, referred to. The relief granted under Rule 616 is not a matter of right, but a matter for the exercise of judicial discretion: *In re Wright*, [1895] 2 Ch. 747, 750. That discretion the Master has exercised by refusing plaintiff's motion, and I should not interfere.

Appeal dismissed with costs to defendant in any event.

MEREDITH, C.J.

JULY 25TH, 1904.

TRIAL.

RAMSAY v. REID.

*Lunatic—Action Brought in Name of—Benefit of Lunatic's
Executors—Payment into Court—Amendment.*

After judgment delivered on 31st July, 1903 (2 O. W. R. 720), the official guardian made inquiry as to the mental condition of plaintiff.

MEREDITH, C.J.—The result of the inquiry establishes that plaintiff has not sufficient capacity to determine as to whether this suit should be brought, that he is in fact a person of unsound mind. not so found by inquisition or judicial inquiry. The action was therefore improperly brought, as plaintiff could sue only through the medium of a next friend. Had that course been adopted, it would have been for the Court at the hearing to have determined whether the action was for the benefit of plaintiff. Looking at the result, as shewn by the bills of costs of the litigation, the plaintiff's amounting to \$225 and defendants' to \$160, it was not for plaintiff's benefit that the action should be brought.

Order made directing the executors to pay the fund in their hands into Court, subject to further order. An application may then be made for payment out of any costs by any of the parties, and also for payment out of any sum necessary to be paid out in the interests of plaintiff. An amendment of the record by adding parties will not be necessary. If any motion made for payment out, notice to be given to the persons who should be made defendants if the action were to go down for hearing again.

ANGLIN, J.

JULY 28TH, 1904.

CHAMBERS.

REX v. WHITESIDES.

Criminal Law—Arrest under Justices' Warrant—Prisoner Found in Another County—Warrant not Indorsed by Justice of that County—Illegality of Arrest—Right to Discharge—Unlawful Caption—Legal Detention—Habeas Corpus—Reference to Divisional Court.

Upon the return of a writ of habeas corpus J. W. McCullough moved for the discharge of the prisoner, on the ground

that, upon the warrant of the convicting justices, who held commissions of the peace for the county of Durham, properly addressed to peace officers of that county, but not backed or indorsed by a justice of the peace for the county of Ontario, as provided by sec. 844 of the Criminal Code, the defendant was unlawfully arrested in the latter county, whence he was unlawfully conveyed to the gaol at Cobourg. This warrant the keeper of that gaol returned with the writ. It was not backed or indorsed by any justice of the peace for the county of Ontario. The fact of the prisoner's arrest at Oshawa, in Ontario county, was shewn by his own affidavit filed on the motion for the writ and was not controverted.

J. R. Cartwright, K.C., for the Crown.

ANGLIN, J.—On behalf of the Crown, exception is taken to the use of the prisoner's affidavit. I think it is admissible. It does not contradict the return, even if that would be a sufficient reason for excluding it. See *Regina v. Boyle*, 4 P. R. 256; *Paley on Convictions*, 7th ed., p. 346. Section 4 of the Habeas Corpus Act, R. S. O. 1897 ch. 83, seems to put this beyond doubt.

Before the provision now made by sec. 844 of the Criminal Code for the backing of warrants issued after summary convictions, Mr. Justice Robertson, in *Regina v. Jones*, 8 C. L. T. Occ. N. 332, held that such a warrant of commitment in execution could not be backed by a justice of the peace for another county, and, upon habeas corpus, he ordered the discharge from the custody of the keeper of the gaol at Brantford of a prisoner arrested in Haldimand county, upon a warrant issued by the police magistrate for the county of Brant, and indorsed by a justice of the peace for the county of Haldimand. This authority would support the present application. It is very meagrely reported in the *Canadian Law Times*, and not elsewhere. I have seen the note book of the learned Judge, which contains the memorandum of this judgment upon which the note in the *Law Times* is founded. While not throwing further light upon the reasons for the conclusions reached, the learned Judge's notes of the argument make it quite apparent that the authorities in point were not cited to him, and the distinction between detention in execution under sentence for a criminal offence and detention under civil process was not called to his attention. Neither was the Attorney-General represented upon the motion.

That such an arrest is illegal, and may give to the defendant a right to redress in proper proceedings may for the present be assumed: *Reid v. Maybee*, 31 C. P. 392; *South-*

wick v. Hare, 24 O. R. 528; that it might be lawfully resisted may be granted: *The Queen v. Crumpton*, 5 Q. B. D. 341.

If the prisoner were detained under civil process, the illegality or irregularity of his original caption would afford ground for his discharge: *Re Eggington*, 2 E. & B. 717. But detention under criminal process for trial, and a fortiori in execution, is regarded very differently by the Courts. The right to habeas corpus and to discharge does not there depend upon the legality or illegality of the original caption, but upon the legality or illegality of the present detention. "A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody, and if sufficient grounds for his detention by the government is shewn, he is not to be discharged for defects in the original arrest or commitment:" *Nishimura Ekiu v. United States*, 142 U. S. at p. 662.

In *Rex v. Gordon*, 1 B. & Ald. 572 n., a prisoner, arrested upon an invalid warrant of a justice of the peace, but for whose detention the same justice had subsequently issued a strictly regular warrant of detainer, which was returned with the writ of habeas corpus, was remanded to custody.

It is well established that if the return to the writ shews a good warrant under which the prisoner is presently in custody for a criminal offence, his prior arrest and detention under a defective process will not avail him upon motion for discharge: *The Queen v. Richards*, 5 Q. B. 926; *Ex p. Cross*, 2 H. & N. 354; *In re Phipps*, 11 W. R. 730; *Southwick v. Hare*, 24 O. R. 528. But the detention, under a second regular warrant, of a prisoner arrested under a prior illegal or defective process is not permitted in civil matters: *In re Eggington* (supra). Again in *In re Scott*, 9 B. & C. 446, a woman, apprehended at Brussels by an English police officer armed only with a warrant issued by the Lord Chief Justice Tenterden, and by such officer carried into England, without any extradition process, applied to Lord Tenterden for a habeas corpus and for her discharge. Her counsel conceded that a prisoner charged with felony will not be released on account of defects in his commitment, but urged that this rule should not extend to cases of misdemeanour, citing *Attorney-General v. Cass*, 11 Price 245. To him Lord Tenterden replied: "That was the case of an information for penalties, and rather in the nature of a civil proceeding to recover a debt than of a criminal one to punish an offence against the public. . . .

The question, therefore, is this, whether, if a person charged with a crime is found in this country, it is the duty

of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought and still continue to think that we cannot inquire into them." The writ was denied. A like disposition was made by the Circuit Court of Illinois of a petition for habeas corpus by a person accused of larceny and forgery, who had been arrested in Peru: *Ex p. Ker*, 18 Fed. Rep. 167. In *Dow's case*, 18 Penn. St. R. 27, the Supreme Court of Pennsylvania applied the same rule to the case of a citizen of that state arrested in Michigan without legal authority and carried into Pennsylvania.

See too *Rex v. Marks*, 3 East 1157, and *Ex p. Krans*, 1 B. & C. 248, cases of original caption without sufficient authority, in which discharge was refused. However illegal and unwarranted the original caption, if the prisoner is now rightly and properly detained, and the warrant returned to the writ of habeas corpus shews such lawful detention, the whole current of authority indicates that the Courts will not grant the discharge.

In *Regina v. McHolme*, 8 P. R. 452, the detention as well as the caption was illegal and unwarranted.

In all the cases cited the prisoners were in custody awaiting trial. But if a person not yet found guilty and by law presumed to be innocent should be held for trial by a competent Court, if in lawful custody within its jurisdiction, notwithstanding any illegality of his caption, the convict held in execution can certainly have no higher right to a discharge.

Being unable to agree with the decision in *Regina v. Jones*, and deeming the matter of sufficient importance to be considered in a higher Court, the proper course for me to take seems to be to exercise the power conferred by sec. 81 (2) of the Judicature Act. I accordingly refer this question to the Divisional Court.

As this course is somewhat unusual, I have put in writing my reasons for adopting it.

OSLER, J.A.

JULY 28TH, 1904.

C.A.—CHAMBERS.

TABB v. GRAND TRUNK R. W. CO.

Appeal—Supreme Court of Canada—Extension of Time for Allowance of Security—Leave to Appeal Necessary but not Granted—Powers of Judge of Appeal.

Motion by defendants to extend the time for the allowance of the security proposed to be given upon an appeal

intended to be brought by defendants from the judgment of the Court of Appeal (3 O. W. R. 885) to the Supreme Court of Canada.

H. E. Rose, for defendants.

D'Arcy Tate, Hamilton, for plaintiff.

OSLER, J.A.—The defendants concede, and I think rightly, that the appeal is one which cannot be brought without leave, which they are unable to move for at present, neither the Court of Appeal nor the Supreme Court sitting in vacation. It appears to me that I have no jurisdiction to make such an order, or (which is much the same thing), if I have, that it is one which would be of no service to defendants and would give them no relief.

If defendants could appeal without leave, I might, under sec. 42 of the Supreme Court Act, "allow" the appeal, i.e., allow the security. That may be done by the Court or a Judge notwithstanding that the appeal is not brought within the time prescribed by sec. 40 of the Act (as amended). "Allowance" of the appeal has been said to involve the granting of leave to appeal, and that would seem to be necessarily so where such allowance is by a jurisdiction competent to grant leave. But, as a single Judge has no power to do that (60 & 61 Vict. ch. 24, sec. 1 (e)), neither has he power to "allow" the security on an appeal which without leave is not competent, and therefore not yet brought. No power has been conferred upon a single Judge, that I can find, to extend the time either for allowing the security or moving for leave to appeal to the Supreme Court in such a case as that, and the power of the full Court of Appeal or of the Supreme Court to grant leave or to allow the appeal, under the provisions above mentioned, does not depend upon the granting by a single Judge of an order to extend the time for doing either. That leave to appeal may be granted though not applied for until after the expiration of the time limited by sec. 40 for bringing the appeal, seems to have been decided in *Bank of B. N. A. v. Walker*, *Coutlee's S. C. Dig. p. 111*, and in *Bank of Montreal v. Demers*, 29 S. C. R. 435. See, however, *Barrett v. Le Syndicat*, 33 S. C. R. 667.

The motion must therefore be refused with costs.

Mr. Rose asked that if I found myself unable to grant his motion I would direct the issue of the judgment of this Court to be stayed until he had an opportunity of moving for leave to appeal. If I have power to do this, which I doubt, at all merely for any such reason as this, I do not think I ought to exercise it.

ANGLIN, J.

JULY 29TH, 1904.

WEEKLY COURT.

HOPKINS v. ANDERSON.

*Injunction—Interim Injunction—User of Right of Way—
Balance of Convenience.*

Motion by plaintiff for an interim injunction restraining defendant from using for other purposes certain land at Niagara Falls over which he had a right of way.

J. J. Foy, K.C., for plaintiff.

H. E. Rose, for defendant.

ANGLIN, J.—Plaintiff's claim involves the construction and possibly the reformation of the deed reserving the right of way in question. Even if he has established a prima facie case for the relief he asks in this action, his material is devoid of any suggestion of irreparable damage, and he has not made out a case for granting an interlocutory injunction upon considerations of comparative convenience. Any injury he may sustain before this action can be tried can be adequately compensated for by pecuniary damages. While the user of the way in dispute by defendant may cause plaintiff some annoyance, and may ultimately be proven to be a violation of plaintiff's legal rights, upon the evidence greater damage is likely to arise to defendant by granting the injunction, in the event of it turning out afterwards to have been wrongly granted, than to plaintiff from withholding it in the event of the legal right proving to be in his favour: *Hamilton and Milton Road Co. v. Raspberry*, 13 O. R. at p. 469. Motion adjourned to the trial.

ANGLIN, J.

JULY 29TH, 1904.

WEEKLY COURT.

GOUINLOCK v. BAKER.

*Partnership—Dissolution—Account—Construction of Articles
—Division of Assets.*

Appeal by defendant from report of Neil McLean, an official referee, to whom this action was referred for trial. Plaintiff sued for a declaration that his partnership with defendant in the profession and business of architects had been dissolved, and for an accounting.

E. F. B. Johnston, K.C., and J. E. Jones, for defendant.

W. M. Douglas, K.C., for plaintiff.

ANGLIN, J.—The Referee held that upon the true construction of the partnership articles the partnership was for a definite term of three years ending on the 1st May, 1902; that the partnership continued at will beyond that term, and on 22nd May, 1902, was terminated by acts of the parties. Defendant contended (1) that the partnership was perpetual, subject only to dissolution by mutual consent. I am not inclined to agree with the interpretation put upon the partnership articles by the Referee. But, without determining that the interpretation was erroneous, I hold that, having regard to the credit which the Referee appears to have given to the testimony of plaintiff, and the somewhat unsatisfactory evidence of defendant as to the negotiations between himself and his partner, the conduct of the parties before and after 1st May, 1902, sufficiently evidences such a mutual consent to a termination of the partnership theretofore existing as under the articles would have wrought an immediate dissolution had the partnership not by tacit agreement been permitted to continue as a partnership at will pending efforts to arrive at a satisfactory understanding for its continuance for a further definite term upon a new basis. This partnership at will was terminated, as found by the Referee, on 22nd May, 1902. If necessary a decree of dissolution might be pronounced as prayed by defendant, and in such a judgment, having regard to all the circumstances, it would not be improper to order the dissolution to take effect as of 22nd May, 1902. Appeal dismissed on this ground.

(2) Upon the construction of clause 6 of the articles defendant should be charged with \$1,300 instead of \$2,000 in respect of the rebate to plaintiff provided for by this clause. Appeal allowed on this ground to this extent.

(3) The Referee was right in allowing to both parties remuneration for their work on the outstanding contracts of the firm which they respectively carried to completion for the benefit of the firm; but the Referee has in most instances erroneously charged several amounts allowed to plaintiff not against the partnership, but against the share of defendant. In the net result the share of plaintiff must be reduced by \$553.30 and that of defendant increased by a like amount, upon this ground of appeal.

(4) As to the accounts in respect of the Alexandra apartments, the net partnership assets should be increased by \$608.51, and the share of defendant therein by \$304.25.

(5) The matters in respect of the Manufacturers' Life contract were satisfactorily dealt with by the Referee.

(6) As to the other contracts, the Referee was right in declining to treat them as partnership assets. Assuming that there was in each case a completed retainer of the firm before its dissolution, its employers would have become entitled to the services of the firm, not of its members as individuals, and certainly not of one member to the exclusion of the other. Gouinlock and Baker having by their own acts made it impossible to give the services bargained for, it is obvious that the employers could not be held to their contracts. The retainer of professional men depends almost entirely upon personal considerations. It is practically impossible therefore to place any value upon the goodwill of a professional business in regard to particular clients. It may be assumed that each client, if given the opportunity, will continue his relations with that member of the firm whose individuality induced him to retain it.

Defendant's appeal allowed to the extent of increasing his share of the partnership assets as found by the Referee, by \$1,557.55. No costs of appeal.

The parties having agreed to accept as final the report of the Referee as varied on appeal, and to accept my disposition as to partnership property not covered by the report, the following further directions are given: (1) Plans and specifications of all buildings completed by either partner since dissolution shall remain the property of the partner superintending such completion. (2) Other plans and specifications shall be included in partnership assets and dealt with as hereinafter directed: (3) Uncollected amounts other than those appertaining to the Manufacturers' building, the Alexandra apartments, and the I. O. F. building, office furniture, plans and specifications as above, papers, books, and catalogues, shall be dealt with as follows: (a) If parties can agree to a division, such division shall be made. (b) If not, and parties can agree upon a person to make such division, it may be made in that way. (c) Failing any such agreement being arrived at within one month, all such assets shall be sold by the Referee to the highest bidder (both partners being at liberty to bid) after such notice to the partners and in such manner, in bulk or in parcels, as the Referee shall see fit to direct. (4) The Union Trust Co. account shall be charged \$60 against plaintiff and \$40 against defendant. (5) The money in the bank to the credit of the partnership to be paid to plaintiff.

ANGLIN, J.

AUGUST 2ND, 1904.

TRIAL.

CLIPSHAM v. TOWN OF ORILLIA.

Municipal Corporations—Statute Authorizing Town to Erect and Operate Electrical Works—Imperative or Permissive—Damage to Lands by Erection of Dam—Temporary Structure for Supply of Material—Independent Contractor—Control by Corporation.

Action for damages for the flooding of plaintiff's farm in the years 1900, 1901, and 1902.

By 62 Vict. ch. 64 (O.) defendants were authorized to erect and operate works on the Ragged Rapids in the River Severn for generating and supplying electric power, and to sell and dispose thereof.

Under the authority of this legislation defendants on 1st August, 1899, entered into a contract with one Patriarche, whereby he agreed to erect and install an electrical power transmission plant at the place mentioned in accordance with specifications, to the satisfaction and under the direction of an engineer and clerk of the works to be appointed by defendants. The contractor agreed to afford to the engineer facilities for proper inspection of the works and materials, "all of which are to be under his control." By the general specifications it was provided that "the contractor will work under the direction of the engineer." Clause 8 of the general conditions provided that "the contractor only is to be responsible for the methods employed in construction; the engineer may approve of same only in so far as to facilitate the proper construction." The general specifications contained also this stipulation: "The dam to be of a thoroughly substantial and durable nature, so constructed, both as to design and its location, as to be capable of resisting the pressure of the highest flood water to which it will be subjected, and of delivering over its crest . . . the flood discharge of the river, without materially raising the lake level at the head of the rapids above the ordinary level for equal floods before the construction of the dam."

F. E. Hodgins, K.C., and T. E. Godson, Bracebridge, for plaintiff.

E. F. B. Johnston, K.C., and D. Inglis Grant, Orillia, for defendants.

ANGLIN, J.—The flooding of plaintiff's lands for the three years in question is abundantly proved. Upon the evidence I find that the flooding in 1900 and 1901 was caused by a temporary dam erected by the contractor at the head of Ragged Rapids, and that the damage so caused to plaintiff in 1900 amounted to \$25, and in 1901 to \$55.

In March, 1902, the main or permanent dam, at the foot of the rapids, was substantially completed. The temporary dam also remained at the head of the rapids. The flooding of plaintiff's lands in this year was more extensive. His loss on this account increased to \$75. The flood lasted, moreover, about one week longer than in the two preceding years. The greater extent of the flooding in 1902 plaintiff does not attribute to the action of the permanent dam. He maintains, however, that for its duration for an additional week the permanent dam was responsible. Plaintiff failed to satisfy me that the permanent dam was a factor either in causing or in producing the flooding of his lands in 1902. But if, as he maintains, this dam retarded the flow of the flood waters, and so prolonged the submersion of his lands for one week, I must find that this occasioned no appreciable damage, because the flooding had already destroyed all prospect of that year's crop on the lands affected. That flooding was caused by the temporary dam. The permanent dam, therefore, in my opinion, caused no part of the injuries for which damages are claimed in this action. . . .

Defendants contend, and I must find that they have established, that this temporary dam was built and maintained by the contractor for the purpose of making the Severn River navigable from Sparrow Lake down to Ragged Rapids, in order to enable him to bring in his supplies and materials more cheaply and expeditiously. . . . The temporary dam was merely part of the means employed by the contractor for the transportation of his supplies. Its proximity to the main dam was merely accidental. It can no more be deemed part of the undertaking itself, or something incidental thereto, than could a tramway or waggon road constructed some miles away, upon which the contractor conveyed materials to the scene of his operations. It was no part of that which the municipality obtained statutory authority to construct. It was not part of that which the contractor was employed to erect, nor was it in any sense necessarily or properly incidental to the work he undertook. It was an independent structure, built by the contractor solely for his own convenience and to suit his own purposes.

It may be that, as to the work itself, the subject of the contract, and as to everything necessarily or properly incidental to its performance, the reservation of powers of supervision and control by the municipality, through its engineer and clerk of works, "destroyed the character of the contract as an independent contract:" *Saunders v. City of Toronto*, 26 A. R. at p. 267; *Penny v. Wimbledon*, [1898] 2 Q. B. 212, [1899] 2 Q. B. 72; so that the municipality could not, in an action properly framed, upon that ground escape responsibility for injuries sustained through improper or defective construction. But I know of no authority which, by reason of a reservation of control by the proprietor or his agents over the works themselves, extends the maxim *respondeat superior* to anything so distinctly collateral as the particular means employed by a contractor for the transportation of his supplies, over which the proprietor had no right to exercise any power of control, and which the contractor was not under any obligation to employ. This is not a case of imperfect or improper execution of the work contracted to be done; nor is it a case of endeavouring to shoulder upon a contractor responsibility for the discharge of a duty imposed upon defendants. . . .

In 1902 the situation was entirely changed. In March of that year, defendants dismissed the contractor, and took possession of the works at Ragged Rapids; the main dam was then practically completed. Before any damage by flooding occurred in 1902, a deputation of farmers from Sparrow Lake, representing plaintiff amongst others, waited upon defendants' town council, and requested the removal of the temporary dam. This was refused. Upon some members of the deputation intimating an intention themselves to destroy the temporary dam, they were threatened with being held responsible for any damage which its removal might occasion to defendants' property. Had the dam been then removed, the flooding complained of in 1902 would not have occurred. For the maintenance of the temporary dam in that year defendants, and they alone, are, in my opinion, responsible.

If this dam were part of the works expressly authorized by the empowering statute, or if it were necessarily, or even properly, to be regarded as incidental to the construction and maintenance of the works so authorized, in the absence of negligence or impropriety in its construction and maintenance (which must be assumed in this action, no such negligence or impropriety being alleged by plaintiff), that statute, if imperative and not merely permissive, would preclude plaintiff from obtaining any redress for injuries conse-

quent upon the exercise of powers so conferred: *London, Brighton, and South Coast R. W. Co. v. Truman*, 11 App. Cas. 45; *Hammersmith R. W. Co. v. Brand*, L. R. 4 H. L. 171; *Canadian Pacific R. W. Co. v. Roy*, [1902] A. C. 220. But, though the statute 62 Vict. ch. 64 should be regarded as imperative (a careful consideration of its purposes and terms rather leads me to the contrary conclusion), defendants' counsel, by his very forceful argument, has convinced me that the temporary dam was not at all a part of the works which it authorized, either expressly or by implication. If, when built and maintained by the contractor, it was not within the purview of his contract so as to impose liability for the injurious consequences which its construction entailed upon defendants, by reason of their right of control through their engineer over the undertaking itself, it did not, when it passed from the possession of the contractor into that of the defendants, so change its character as to become part of the works which the statute authorized and empowered them to construct. It remained a thing so collateral to the works which the Legislature empowered the defendants to undertake that, whether the statute be imperative or permissive . . . its protecting ægis cannot be extended to shield from liability those who continued to maintain the temporary dam. The very ground upon which defendants escape liability for the construction and maintenance of this dam by their contractor, precludes their claim of statutory immunity against responsibility for the injuries which they have caused by themselves subsequently maintaining it.

Having regard to the language of the statute—permissive in character—to the absence of all provision for compensation, to the fact that legislation was requisite to enable defendants as a municipal corporation to engage in such an undertaking, to the circumstances that the quantity of water to be dammed back, the amount of electrical supply to be created, the height and the immediate location of the dam or dams to be constructed, and the provision to be made for the escape of surplus water, are all left to the determination of defendants, to the provision enabling defendants to become vendors of surplus power at profitable prices, I strongly incline to the view that, according to its sound construction, this statute is permissive merely, and that “the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law rights of others.” *Canadian Pacific R. W. Co. v. Parke*, [1899] A. C. 535, 545. If so, though this temporary dam should be held to be part

of the undertaking authorized by the statute, its maintenance would only be lawful if without injury to others: *Metropolitan Asylums Managers v. Hill*, 6 App. Cas. at p. 203.

For the foregoing reasons judgment should be entered for plaintiff for \$75 for damages sustained in the year 1902. Prior to its transfer to High Court, plaintiff is entitled to costs of this action upon the District Court tariff. Subsequent to such transfer, having regard to all the circumstances, especially to the fact that upon the determination of the questions involved in this action the rights of a number of other persons depend, I allow to plaintiff his general costs on the High Court scale, except costs incurred in his unsuccessful attempt to prove that the main dam caused or contributed to the injuries in respect of which this action was brought.

AUGUST 8TH, 1904.

DIVISIONAL COURT.

EVANS v. ROLLS.

Promissory Notes—Holder for Value—Notice—Executor.

Appeal by defendants from the refusal of their motion for a new trial in an action in the 10th Division Court in the County of York, in which plaintiff had recovered judgment against them for \$143.55 with costs.

The action was on three promissory notes, two of them for \$5 and \$5.50 respectively, made by defendant Rolls individually, and the third for \$144 made by him individually and also as executor of one Rolls; all of them were payable to the order of D. A. Robson, and were indorsed by him to plaintiff before their maturity.

W. Cook, for defendants.

G. Grant, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.—It appears to be undisputed that something is still owing on these promissory notes; defendant Rolls in his testimony at the trial admitted this, but said that he did not know how much. The real dispute appears, however, to have been as to who should bear the loss of \$49.80 which Rolls was entitled to receive as the balance coming to him on the transaction which resulted in the giving of the

\$144 note, which he never received, and for which Robson gave him his (Robson's) cheque on the Sovereign Bank, which was dishonoured.

The appellants' contention is that Robson was the agent of plaintiff in the transaction, and that plaintiff should, therefore, bear the loss; and the latter contends that he is the holder for value of the note without notice, and therefore entitled to recover the full amount, though Robson could not.

The question is one of fact, which the Judge before whom the action was tried has found in favour of plaintiff, and we cannot see that his finding is wrong; and it may not therefore be disturbed.

We think the learned Judge was wrong in giving judgment against defendant Rolls as executor. There is nothing to shew that the transaction was one in which the Rolls estate was in any way interested, and even if it had been shewn that the transaction was one entirely for the benefit of the estate, the executor had no power to give a promissory note in his capacity of executor so as to bind the estate, even if he had been the sole executor, which he was not.

The judgment against defendant Rolls as executor must therefore be reversed and judgment must be entered dismissing the action against him as such executor without costs, and with that variation the judgment will be affirmed.

There will be no costs of the appeal to either party.

AUGUST 6TH, 1904.

MORTON v. GRAND TRUNK R. W. CO.

(TWO ACTIONS.)

Consolidation of Actions—Two Actions by Different Plaintiffs against same Defendants for one Cause—Tort—Fatal Injuries Act—Stay of Proceedings—Undertaking—Order.

Appeal by defendants from an order of FALCONBRIDGE, C.J., 3 O. W. R. 704, affirming order of Master in Chambers, ib. 640, dismissing their application for an order to stay or dismiss one of the actions, or consolidating them, or for such further or other order as might seem just under the circumstances.

D. L. McCarthy, for appellants.

J. D. Falconbridge, for plaintiff Aimée Florence Morton.

D'Arcy Tate, Hamilton, for plaintiff Maud Morton.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.—William Morton having been killed under circumstances which, according to the contention of the plaintiffs, entitle his surviving wife, parent, and child or children to an action under the provisions of R. S. O. 1897 ch. 166, an action was begun on 31st December, 1902, by Aimée Florence Morton, who claims to be the widow of the deceased, and Edward Morton and Clara L. Morton, the deceased's two children by her.

The statement of claim does not contain any particulars of the persons for whom and on whose behalf the action is brought, nor, as far as appears, have any such particulars been delivered. The action must, however, I think, be taken to be brought on behalf of the plaintiff Aimée Florence Morton, as the widow, and the plaintiffs Edward Morton and Clara L. Morton, as the children, of the deceased.

On 8th January, 1903, the second action was begun, in which the plaintiff is Maud Morton, who claims to be the widow of the deceased, and this action is brought, according to the allegations of the statement of claim (paragraph 8) for the benefit of herself and of Thelma Maud Morton, the infant child of herself and the deceased.

It seems to be not seriously disputed that the plaintiff Aimée Florence Morton was at one time the wife of the deceased, and that her two co-plaintiffs are the children of her marriage with him; and it is also not disputed that the claim of the plaintiff Maud Morton to be the widow of the deceased, and of Thelma Maud Morton to be his lawful child, depends upon the validity of a divorce which the deceased is said to have obtained from his first wife.

The Act provides that not more than one action shall lie for and in respect of the same subject matter of complaint (sec. 6), and it provides that if there be no executor or administrator of the deceased, or if there being such an executor or administrator, no action as in the Act mentioned is brought within six months after the death of the deceased by and in the name of his executor or administrator, the action "may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator," and that "every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were

brought by and in the name of such executor or administrator."

A person who sues, whether the executor or administrator, or one of the class for whose benefit the action may be brought, occupies, as it has been held, the position of a trustee or quasi trustee, for those on whose behalf the action is brought or may be brought, who are not named as plaintiffs to it.

Having regard to this provision, and that as to one action only lying in respect of the same subject matter of complaint, it appears to me to be reasonably clear that the case at bar is one in which under the old practice the appellants might have pleaded in abatement of the second the pendency of the first action, and that, now that pleading in abatement is abolished, the case is one for the application of the power of the Court to stay proceedings, a procedure which has been substituted for pleading in abatement.

Though the parties to the actions are not the same, both actions must necessarily be, as any judgment in either of them would also be, for the benefit of all who are entitled to damages under the Act, subject to this observation, that if the plaintiff in the second action should fail in establishing that she is the widow of the deceased, and therefore one of the class entitled to damages, as she sues alone, and the only other person for whose benefit she brings her action would in that event also not be entitled, her action would probably entirely fail.

Whether or not the plaintiff Aimée Florence Morton is one of the class, the other two plaintiffs in the first action are admittedly of it, they being children of the deceased, and their right not being affected by the divorce, if there has been a divorce and it is valid.

Whether or not, therefore, the plaintiff in the second action, and her child, are entitled to damages, their rights, I think, must be worked out in the first action, which, as I have said, is an action for the benefit of all.

The Act is defective in not making any express provision for a case such as this, where each of two persons claims to be the widow of the deceased, and a third to be his lawful child, the relation of widow and that of lawful child asserted in the second action being disputed by the plaintiffs in the first.

I do not think, however, that the powers of the Court, especially since the Judicature Act, are so restricted that it is not possible to provide on such an application as this, for the determination of all the matters which must be dealt with

before the rights of the parties are finally settled, and that without doing any injustice to any of them.

In order that the possibility of injustice to the plaintiff in the second action and her infant child may be avoided, it is, I think, competent for the Court to require the plaintiffs in the first action to undertake to bring to the notice of the Court the claims that have been made in the second action, in order that they may be passed upon at the trial.

The plaintiffs in the first action are, as I have said, trustees or quasi trustees for those entitled under the Act, and it would, I think, be a breach of trust on their part not to present for the consideration of the Court all the claims which have been made by persons claiming to have stood in such relation to the deceased as to be entitled to damages on account of his death; and the plaintiffs in the first action, as a condition of their being allowed to proceed with it, should be required to give an undertaking to do this, and to allow the plaintiff in the second action to appear by counsel and take part in the trial.

To permit the plaintiffs in the first action to proceed with it in entire disregard of the claims of the persons for whose benefit the second action is brought, which may turn out to be valid claims, would be, I think, to permit them to abuse the process of the Court, and the Court is not only entitled, but, I think, bound, to use its inherent power to prevent its procedure being so abused.

Without at all assuming to direct the course which the Judge before whom the action is tried may take, it would seem to me that it would be the most convenient and the best course first to determine without the aid of a jury the question of the validity of the alleged divorce and of the marriage with the deceased of the plaintiff in the second action; and, that question having been determined, to leave to the jury, or himself to try, any other issues of fact, and to assess the damages, and, to avoid the possibility of another trial becoming necessary, to assess contingently the damages of the plaintiff who is, in his view, unsuccessful in establishing her claim to be the widow of the deceased.

If the opinion I have expressed be not the correct one, I do not see what there would be to prevent one of three children of a deceased person, all admittedly entitled to damages, if any one of them is, from bringing an action claiming damages on his own behalf and omitting entirely in his pleadings or otherwise to bring to the notice of the Court the claims of the other two children; and the machinery of the

Court cannot surely be so ineffective that the Court would not in such a case have power to prevent the action from proceeding in the way in which it had been launched, and to enable the other children in some way to intervene in the action so that their claims might be included in it and dealt with at the trial.

The result is that, in my opinion, the appeal should be allowed, and the orders appealed from discharged, and for them an order should be substituted staying until further order all proceedings in the second action, and requiring the plaintiffs in the first action to give the undertaking which I have mentioned, and to stay their action until it is given; and the costs of the motion to the Master in Chambers, and of the appeal from it to the learned Chief Justice, and of this appeal, should be costs in the cause to the successful party.

In the event of the persons for whose benefit the second action is brought failing to establish their claims, they should have no costs; and in the event of their succeeding, unless the Judge at the trial otherwise orders, their costs, including the costs of the action, should be borne by the defendants.

The defendants also, as a condition of the relief which our order will give them, must give a similar undertaking to that which has been required of the plaintiffs in the first action.

It may be that what I desire to accomplish by the order I would make might be as well, if not better, attained by an order adding the plaintiff in the second action and her infant child as parties defendants to the first action; staying the second action and providing that the question whether the plaintiff in the second action is the widow of the deceased and her infant daughter his lawful child, should be tried before the other issues in the action, though not necessarily at a different time. Before the Judicature Act such an order was a common enough proceeding in the Court of Chancery, though it was an impossible one to be made in a common law Court, but since the Act it is difficult to see any good reason why the former Chancery procedure should not be made use of in such a case as this.

If the parties prefer such an order to that which I have indicated as the one I would make on this motion, such an order may go. I can see no possibility of prejudice to any one from the making of such an order, and I venture to hope that all parties interested will agree to its being made, but if they do not all agree, the defendants may, if they choose to do so, and the plaintiff in the second action consents, take out

the order in that form, and the costs in that event will be in the cause to the party or parties who are ultimately successful in the action, unless and except in so far as the trial Judge otherwise directs.

AUGUST 6TH, 1904.

DIVISIONAL COURT.

RE WOODALL.

Execution—Fi. Fa. Lands—Expiry of—Renewal—Life of Judgment.

Appeal by William David McPherson, the execution creditor, from an order of STREET, J., dated 19th January, 1904, whereby it was declared that the appellant had no lien or charge on the interest of the estate of Frederick Peter Woodall in the lands in question, "by virtue of the writ of execution in the hands of the sheriff of the city of Toronto against the lands of the said Frederick Peter Woodall, in an action in which the said William David McPherson is plaintiff and one David Pinal is, and the said Frederick Peter Woodall was, defendant, and in which the Union Trust Company, as administrators of the estate of the said Frederick Peter Woodall, deceased, have been added as defendants."

The appeal was heard by MEREDITH, C.J., MACMAHON, J., TEETZEL, J.

G. C. Campbell, for appellant.

H. C. Fowler, for the Union Trust Company.

W. W. Vickers, for J. Small, a creditor of the estate of F. P. Woodall.

MEREDITH, C.J.—My brother Street followed the decision of my late brother Ferguson in *Neil v. Almond*, 29 O. R. 63, and we are asked on this appeal to overrule that case.

The question for determination is a difficult one, but I have reached the conclusion that we cannot say that *Neil v. Almond* was not rightly decided.

The reasoning upon which the judgment in that case was founded, as I understand it, is that the judgment debt and costs become, by the placing of a writ of execution against lands in the hands of the sheriff, a sum of money secured by a lien or otherwise charged upon or payable out of the lands then owned by the judgment debtor in the county to the

sheriff of which the writ is directed, within the meaning of sec. 23 of the Real Property Limitation Act, R. S. O. ch. 133; that, although the execution has been kept alive by regular renewals of it, the writ cannot be enforced after the expiration of ten years from the time it was placed in the hands of the sheriff against such lands, unless there has in the meantime been either the part payment or acknowledgment mentioned in sec. 23; and that a proceeding to sell the land is a proceeding brought to recover the money out of the land, within the meaning of the section.

It was argued for the appellant that the execution was kept alive by the renewals of it, so that it continued to bind the lands of the execution debtor, and to warrant the taking of proceedings to realize by sale, after the expiration of the ten years, and that the execution might be kept perpetually alive by successive renewals of it, or that, at all events, it might be kept alive until the right to recover upon the judgment itself had become barred by the operation of the Statute of Limitations applicable to it, i.e., twenty years from its recovery.

It was not disputed by the respondents, as indeed it could not be, that, according to the decisions of the Courts of this Province, the remedy upon a judgment by action or scire facias, or by the proceedings which have been substituted for the writ of scire facias, is not barred until the expiration of twenty years from the recovery of the judgment; but it was contended that the lien which was created by the delivery of the writ of execution to the sheriff stood in no different position from a lien created by the execution debtor himself, and that at the expiry of ten years from the commencement of it the remedy for its enforcement was barred, unless there had been either acknowledgment or part payment.

After the best consideration I have been able to give to the matter, I have come to the conclusion that the contention of the respondents in this respect is well founded, and unless, therefore, the effect of the renewals was to give a new starting point for the running of the statute, at the time of each renewal, it follows that the last renewal, which occurred after the expiration of ten years from the time when the writ was delivered to the sheriff for execution, was ineffectual to keep alive the lien upon the lands of the execution debtor by that delivery.

If the appellant's contention were well founded, I see no escape from the conclusion that an execution against lands

issued before the period of twenty years from the recovery of the judgment had run, may be kept alive perpetually by successive renewals. Such a result cannot, I think, have been contemplated by the Legislature, and it seems to me more to adopt the view that, when the remedy upon the judgment becomes barred by the operation of the Statute of Limitations, the right to enforce an execution then current is barred also.

But, whether or not that is the correct view is immaterial, as far as the question which was determined in *Neil v. Almond* is concerned, viz., the question when the lien created by the delivery of the writ to the sheriff for execution became barred.

It has been settled by the decisions, both in this Province and in England, that the Statute of Limitations is an answer to an application for leave to issue execution on a judgment whenever it would be a bar to an action or proceeding by *scire facias* founded upon it: *Caspar v. Keachie*, 41 U. C. R. 599; *Jay v. Johnstone*, [1893] 1 Q. B. 24, 189; and cases there cited.

It is true that Con. Rule 872, in terms, places no limit upon the right of an execution creditor to keep alive a writ of execution by renewing it, but the Rule must, I think, be read subject to the provisions of sec. 23 of the Real Property Limitation Act; and, if that be so, it must also, I think, be read subject to the provisions of the Act, when the question is as to the right of the execution creditor to enforce his lien against the lands which are bound by his execution.

This view of the law works no hardship upon the execution creditor, for, although he has renewed his writ from time to time, he has otherwise lain by and has taken no steps to make his lien effective by realizing it.

It may be that rights in the land which is bound by such a lien have been acquired by innocent purchasers, who, although they may have had the means of discovering by search in the sheriff's office that the writ has been kept alive, may have failed to do so, and it may have been thought more just that an execution creditor who had so lain by should lose his lien than that the innocent purchaser should be bound to satisfy it.

The object of the Legislature was, I think, to prevent, after the expiry of the statutory period of ten years, the enforcement of the lien, unless in the meantime there had been

either part payment or acknowledgment, and to give effect to the contention of the appellant would, as it appears to me, be to add to the exceptions which are to be found in section 23, another, to the following effect, "and unless in the meantime where the lien has been created by the placing of a writ of execution against lands in the hands of the sheriff, the writ has been kept alive by renewals of it," or words of similar import.

It may also be pointed out that according to the provisions of sec. 23, the ten years are those "next after a present right to receive the same," i.e., the money, "accrued to some person capable of giving a discharge for or release of the same;" and how it can be said that the renewal of the writ conferred upon the execution creditor a new right to receive the amount of his judgment and costs, I cannot understand.

It is true that a judgment in *scire facias*, that the execution creditor is entitled to have execution, gives a new starting point for the reckoning of the statutory period: *Farran v. Berresford*, 10 Cl. & F. 319; *Farrell v. Gleason*, 11 Cl. & F. 702; and it may be that where an order for leave to issue execution is made, the same result will follow, but in these cases the foundation for the new right is the judicial declaration of it in the one case by the judgment in *scire facias*, and in the other by the order of the Court.

No such foundation exists in case of the renewal of the writ, which is the act not of the Court but of the execution creditor.

Stewart v. Rhodes, [1900] 1 Ch. 386, may be referred to as to the effect of an order for leave to issue execution.

I have assumed that the lands in question in this case were owned by the execution debtor at the time the writ was placed in the hands of the sheriff, or at all events for more than ten years before the last renewal was effected. If this be not so, the case may be spoken to again, but, subject to this, the appeal should, in my opinion, be dismissed with costs.

MACMAHON, J., gave reasons in writing for the same conclusion.

TEETZEL, J., concurred.

IDINGTON, J.

AUGUST 18TH, 1904.

CHAMBERS.

TABB v. GRAND TRUNK R. W. CO.

Staying Proceedings—Judgment Affirmed by Court of Appeal—Proposed Appeal to Supreme Court of Canada—Necessity for Leave—Powers of Master in Chambers and Judge—Grounds for Exercise of Power.

Appeal by plaintiff from order of Master in Chambers staying proceedings on a judgment for plaintiff for \$400 damages and costs (affirmed by the Court of Appeal, 3 O. W. R. 885), till such time as defendants could move for leave to appeal to the Supreme Court of Canada, unless the solicitors for plaintiff would undertake to return, if now paid them, the damages and costs, in the event of the judgment of the Court of Appeal being reversed.

There was no right of appeal to the Supreme Court without leave, and a Judge of the Court of Appeal had refused (ante 116) to extend the time for the allowance of the security upon the proposed appeal.

The defendants made a cross-motion for the same order as had been made by the Master in Chambers in the event of it being held that the Master had no power to make the order.

A. G. Slaght, for plaintiff.

H. E. Rose, for defendants.

IDINGTON, J.—There can be no doubt that the Master's powers are defined and limited by Rule 42. From the comprehensive powers given, that of "staying proceedings after verdict or on judgment after trial or hearing before a Judge" is excepted by clause 17 (d).

I suppose the powers given without regard to the exception would enable the Master in Chambers to make the order, but this express exception therefrom must, I assume, have escaped the learned Master's notice. The exception is so express and comprehensive that I have no doubt that the order appealed against exceeds the Master's jurisdiction and must be set aside. . . .

[Reference to *Oppert v. Beaumont*, 18 Q. B. D. 435; *Holmsted & Langton*, p. 205.]

As to the right of the Court or a Judge to stay proceedings after judgment in the Court of Appeal upholding the verdict and judgment until such time as may enable defendants to apply to the Supreme Court or Court of Appeal for leave to appeal, I think possibly—either under the Judicature Act, 1895, or independently—such a power may exist; but I do not think this is a case where I should, if it exist, exercise it. I need not, therefore, determine exactly what power I may have despite Rule 843. . . . The language of this Rule and the existence of a number of Rules and statutory provisions elsewhere limiting its effect and specifically providing for a stay of proceedings to enable litigants to proceed safely to appeal, would seem to indicate that any reserve power beyond these Rules and statutory provisions, if it exist, must be exercised only upon the rarest occasions that might invoke the equitable jurisdiction of the Court to prevent its process being abused or made to work injustice.

No authority has been cited to me, nor can I find any, that would warrant me in making the order asked for, under the circumstances existing here.

The case of *Hart v. Trusts and Guarantee Co.* (not reported), to which I was referred, did not go so far as I am asked to go here. That only involved the costs, and seemed to be like that class of cases that Lord Herschell referred to in *Hood Barrs v. Crossman*, [1897] A. C. at p. 175. . . .

Brigham v. Smith, 3 Ch. Ch. 313, seems much more in point than anything else I have been able to find . . . I think I may here well adopt the language of the learned Referee there where he said: "I do not see how I can make an order to stay proceedings pending an appeal which is not, in the present position of the suit, open to the plaintiff, and which, for anything that appears at present, he may never obtain leave to bring."

Assuming the existence of a power to make such an order, it does not appear to me that there is in this case anything to call for the exercise of it. The amount of the judgment does not. There does not seem to be a doubtful question of law of such general importance as to call for such extraordinary interference. Negligence by defendants has been found, and the irresponsible sort of contributory negligence of a child has been passed upon by the tribunal that has to pass upon such facts as must determine the rights of the parties in any such case. Such a state of facts will probably not be permitted to exist in future.

The liability for this negligence might well be rested on the common law, even if the statute (as to fencing railways) is to be read as counsel contended it must since *McKay v. Grand Trunk R. W. Co.*, 5 O. L. R. 313, 2 O. W. R. 57, 34 S. C. R. 81.

The Railway Act of 1903, I think, by its sec. 194, robs the nice question propounded by counsel for defendants, of whether fences are only to be kept up in townships and not in towns or cities, of any further general importance.

I might point out that under the authority of *The Rediva*, 5 P. D. 1, it is quite possible that the stay of execution in such a case rests with the Court of Appeal or a Judge thereof; and, if so, it has been passed upon by Mr. Justice Osler refusing to interfere.

I think the appeal must be allowed and the motion to stay execution be dismissed, and in each case of course with costs.

MACLAREN, J.A.

AUGUST 23RD, 1904.

WEEKLY COURT.

RE SOLICITOR.

Solicitor—Costs—Taxation—Retainer — Negligence — Costs Paid by Client to Opposite Party in Litigation—Reimbursement by Solicitor—Account—Items.

Appeal by solicitor from report of Master at Brampton upon a taxation of solicitor's costs and taking accounts between solicitor and client.

The appeal was heard by MACLAREN, J.A., sitting for a Judge of the High Court.

D. O. Cameron, for solicitor.

S. H. Bradford, for client.

MACLAREN, J.A.—On the application of the client eight bills of costs were referred for taxation to the local Master at Brampton, who was to take the account between the parties. By consent of the parties all questions of retainer, carelessness, impropriety, and negligence in the conduct of the business to which the bills related, were referred to the

local Master to be determined by him, with power to make allowances therefor, with leave to the applicant to dispute the retainer of the solicitor, and his liability for all or any of the bills of costs delivered.

Of the eight bills one was a general one, which was taxed at \$21.56, and another was for the defence of an action for slander brought against the applicant, which never came to trial, the costs being taxed at \$68.27. The liability for these two bills was admitted.

The other bills were all connected with an action brought in the name of the applicant against a neighbour for trespass upon a small piece of land of trifling value, the line between their two farms being in dispute. The land in question contained 2 or 3 acres, worth in all from \$25 to \$50, and the six bills of costs of the solicitor in the litigation concerning it amounted to \$1,149.34. The course of the litigation, as well as the disparity between the value of the land and the amount of money spent over it, may well be described as extraordinary.

At the trial the action was dismissed with costs, on the ground that plaintiff had not shewn where the true line between the two farms was, and because defendant had been in possession for years of the piece of land in question. Plaintiff moved in the Divisional Court for a new trial, and it was granted him on condition of his paying defendant's costs at the trial and in the Divisional Court. These were taxed at \$177.65 and paid.

At the second trial the action was dismissed at the close of plaintiff's case, on the ground that plaintiff had not shewn title to his lot, the Judge also holding that the survey on behalf of plaintiff was defective and could not be upheld on account of the chain-bearer not having been sworn. On a second appeal to the Divisional Court this judgment was set aside with costs and a third trial ordered.

On the eve of the third trial the parties settled, plaintiff being allowed the land and \$50 for his costs.

The six bills rendered by the solicitor in connection with this litigation were: (1) for the first trial; (2) for the first Divisional Court; (3) for the second trial; (4) for the second Divisional Court; (5) for preparation for the third trial; and (6) on an appeal from the taxation of defendant's bills against plaintiff. . . .

The writ in the trespass action was issued by a former partner of the solicitor whom the applicant consulted about the recovery of the land in question. On the reference the applicant denied that he gave any retainer for this action, and alleged that in any event it was only conditional on his not being liable for any costs, and contended that he should be relieved on the ground of negligence on the part of the solicitor. He also contended that he had a right on the same ground to be reimbursed for the costs paid defendant for the first trial and the first motion to the Divisional Court, and for interest paid to the bank and other persons.

After hearing the applicant and the solicitor and their witnesses, the Master found that the applicant conditionally retained the former partner of the solicitor to protect his interest in the land in dispute, but gave no instructions for the action, and would not have subsequently sanctioned or adopted the proceedings if he had been properly advised of the great risk and expense. He further found that the solicitor was, on account of negligence, not entitled to the costs of the first trial or of the first motion to the Divisional Court, and held that he should reimburse the applicant the \$177.65 paid to defendant's solicitor, particularly as the payment was only made by the applicant on a representation by the solicitor that it was merely provisional and would be recouped to him in case of subsequent success. He disallowed most of the items of surcharge of the applicant, but allowed him \$45.50 on account of delay in the payment of a mortgage.

The six bills connected with the trespass action were taxed by the Master at \$464.79, making with the costs taxed in the slander action (\$68.27) and the amount allowed on the general account (\$21.56) a total due the solicitor of \$554.62.

The transactions between the solicitor and the applicant included the discounting of a series of notes in the bank, the placing of a mortgage upon the applicant's farm, and the paying off an old mortgage, besides some minor matters. On adjusting the accounts the Master found that there was in the hands of the solicitor a balance of \$815.27. Deducting from this his bills taxed at \$554.62, and adding the \$177.55 paid defendant's solicitor in the trespass action, a balance remained due to the applicant of \$438.20, which the Master reported should be paid him by the solicitor, with the costs of the reference and taxation. . . . The solicitor . . . contends that the findings of the Master are

not sustained by the evidence with regard to retainer, negligence, bank discounts, and interest upon costs.

After a careful perusal of the testimony taken before the Master and of the evidence and proceedings at the two trials and an examination of the numerous exhibits filed on the reference, I have come to the conclusion that the findings on these points are in accordance with the evidence before him.

With regard to the reimbursement of the \$177.65 paid to defendant's solicitor, it is contended by the appellant that the order of reference does not give the Master jurisdiction with respect to this. On the other hand it is urged on behalf of the client that the second paragraph of the order of reference, which was added by consent of the parties, gives such jurisdiction, and that it in effect referred the question to the Master as *persona designata*, and that consequently there is no appeal from his decision on this point.

I am of opinion that the terms of the order of reference are sufficiently wide to give the Master jurisdiction with respect to this item, and that his finding regarding it is authorized by the evidence. Consequently I do not find it necessary to pass upon the objection raised by the applicant.

With regard, however, to the \$45.50 charged to the solicitor for interest upon the mortgage money, I do not find sufficient evidence to sustain it, and I am of opinion that it should be deducted from the amount ordered to be repaid.

The other objections to the report, in my opinion, fail.

The amount to be paid to the applicant should consequently be reduced to \$392.70, and there should be no costs of the appeal to either party.

TEETZEL, J.

SEPTEMBER 1ST, 1904.

TRIAL.

HARRIS v. GREENWOOD.

Promissory Note—Joint Note—Statute of Limitations—Payments by one Maker—Agency—Evidence of—Costs.

Action upon a joint promissory note made by W. W. Greenwood, deceased, and his wife, defendant Mary J. Greenwood. The defence chiefly relied upon was that of the Statute of Limitations, in reply to which plaintiff proved

several payments on account by W. W. Greenwood within six years of the commencement of the action, and plaintiff sought to establish that these payments were out of money to which defendant Mary J. Greenwood was entitled, and were made by her husband with her authority.

E. E. A. DuVernet and J. H. Ingersoll, St. Catharines, for plaintiff.

E. D. Armour, K.C., and A. W. Marquis, St. Catharines, for defendant Mary J. Greenwood.

TEETZEL, J.—In my opinion, the evidence falls short of establishing either that the payments or any of them were made out of the wife's money with her knowledge and consent, or that in making any of the payments the husband was acting as her agent. The fact (which I find) that the husband had general authority to collect certain assets belonging to the wife, and was allowed by her to apply the same either for his own benefit or hers as he saw fit, would not, I think, constitute him her agent so that by payments (out of the money so collected) on account of the note he could either continue or renew her liability upon a joint note which but for such payments would be barred by the Statute of Limitations. Payments made by one of two joint makers will not take the case out of the statute as against the other unless made expressly as his agent and by his authority: *Creighton v. Allen*, 26 U. C. R. 627. See also *Paxton v. Smith*, 18 O. R. 178. While the husband did make collections for the wife and did not account to her fully for the same, there is no evidence that any part of such collections was ever specifically applied by him upon the note. It is, however, clear that, if he did so apply the money, it was without her knowledge or express consent.

While this note was outstanding the husband caused to be conveyed to the wife several parcels of incumbered real estate, the equity of redemption in which would have been available in his hands to pay plaintiff, and, while I must dismiss the action as against defendant Mary J. Greenwood, I think, under the circumstances, it should be without costs.

TEETZEL, J.

SEPTEMBER 6TH, 1904.

CHAMBERS.

RE KIRKBY AND CHURCHWARDENS OF ALL
SAINTS, COLLINGWOOD.

Arbitration and Award—Validity of Submission—Powers of Churchwardens — Agreement with Rector — Arrears of Stipend—Interest—Moneys Expended by Rector on Repairs.

Motion by the Rev. L. H. Kirkby to enforce an award made pursuant to an agreement of reference between him and the churchwardens of All Saints church in the town of Collingwood, under which he was awarded: (1) \$50 as the equivalent of interest on admitted arrears of stipend; (2) \$1,500 in respect of repairs and improvements done at his expense to the rectory house and property, with interest at six per cent. from 27th March, 1900. The arbitrators' costs and expenses were directed to be paid by the churchwardens, and each party was to bear his own costs of the arbitration.

By an order of this Court, dated 31st October, 1902, upon application for a special case, the arbitrator was directed in making his award to state on the face thereof the view of the law on which he proceeded, and it was further ordered that either party should be at liberty to move to set the award aside on the ground of error in any such view of the law.

After reciting the agreement of reference and the above order, the arbitrator stated: "I proceed in making this award on the assumption that the churchwardens had power to bind the vestry of the parish of All Saints, Collingwood, in their dealings with the incumbent and in the submission to arbitration. If there were otherwise any doubt as to the power of the churchwardens, I find that the matter was concluded by the action of the vestry at a special meeting thereof held on 29th October, 1900."

He then proceeded to make certain findings of fact, and stated: "Finding, as I do, an express agreement binding upon the churchwardens and upon the vestry in the spring of 1900, upon a new consideration, to pay an arbitrated amount for these improvements and repairs, it is unnecessary for me to consider the Statute of Limitations or the canon law which the churchwardens so strongly urged as a defence."

The award was dated 30th January, 1903, and on 12th June, 1903, by another order of this Court, an application by the churchwardens for an order permitting them to apply to set aside the award, notwithstanding the lapse of six weeks from publication thereof, was dismissed, upon counsel for Mr. Kirkby "agreeing and undertaking that he will not hereafter allege personal liability upon the part of the said churchwardens in respect of the said award."

R. B. Henderson, for Mr. Kirkby.

W. E. Middleton, for the churchwardens.

TEETZEL, J.—Upon the motion before me, Mr. Middleton, among other objections, urged that the award should not be enforced by reason of the neglect or refusal of the arbitrator to state his view of the law, as required by the order first above recited.

I do not think it is necessary for me to decide whether the arbitrator has or has not faithfully observed this order, because I think, if he has not done so, any objection on that ground is overcome by the order of 12th June.

It was further contended by Mr. Middleton that the award was not enforceable because the church being a free pew church with no revenue except voluntary contributions, the churchwardens had no power as a corporation to bind their successors or the church property by any agreement with Mr. Kirkby or by the submission to arbitration.

In support of this contention, *Daw v. Ackerill*, 25 A. R. 37, was relied upon. That was an action by a rector to recover a balance of stipend, and it was held upon the particular facts of that case that plaintiff could not recover. . .

As respects the allowance of \$50 for interest on arrears of stipend, the arbitrator does not find any facts from which I can distinguish Mr. Kirkby's rights to recover this sum from the judgment in *Daw v. Ackerill*.

As to the item of \$1,500 and interest, I think there is a clear distinction, from the following findings of fact set forth by the arbitrator in his award: (1) that during his incumbency Mr. Kirkby expended a large amount of money in substantial improvements and repairs by which the rectory house and the property was very considerably enhanced in value, and which had not been repaid to him; (2) that the churchwardens and vestry were very anxious to get rid of Mr. Kirkby and to effect an exchange with another minister;

(3) that Mr. Kirkby refused to vacate and carry out the proposed exchange until it was agreed that his claim for repairs and improvements should be paid, the amount to be determined by arbitration, as provided in the submission agreement.

If the churchwardens as a corporation, with the approval of the vestry, have the power to make such an agreement as that found by the arbitrator, it seems to me *Daw v. Ackerill* can have no application. The agreement to pay what might be awarded was not in any sense provisional or dependent upon the goodwill offerings of the parish, as it was found to be as a fact in the *Daw* case, but it was an agreement to pay the sum awarded absolutely and without any limitation or condition.

Mr. Kirkby had expended his money for the benefit of the parish, and, although his vestry might successfully resist payment of any stipend to him, he had a right to remain in possession of the rectory and church indefinitely, for there was no suggestion of any legal ground for his deprivation or deposition.

The consideration of the money expended by Mr. Kirkby and his consent to vacate the parish at the request of his vestry and churchwardens was ample to support an agreement to pay him whatever an arbitrator might determine in respect of money so expended.

I think therefore that, assuming the churchwardens have the power to make such an agreement, the principle of such cases as *Frontenac v. Kingston*, 31 U. R. C. at 595-6, and *Elderslie v. Paisley*, 8 O. R. 270, applies, and that plaintiff is entitled to a judgment against the churchwardens as a corporation, notwithstanding there may be at present no property or fund out of which it can be satisfied.

Then, was it within the power of the churchwardens as a corporation to make the agreement found by the arbitrator to have been made, including the agreement to arbitrate?

By 47 Vict. ch. 89, it is enacted that "the churchwardens of any church in the diocese of Toronto . . . shall, whether they be churchwardens of pew or of free churches, besides possessing the powers and authorities conferred upon such churchwardens by any Act of the Legislature now in force, be a corporation with perpetual succession under the name of 'The Churchwardens of the Church of _____ in the _____' to represent the interests of the church of which they are so elected or appointed and of the members

thereof, and shall and may sue and be sued, answer and be answered unto, in all manner of suits, actions, and proceedings whatsoever, for and in respect of such churches and church yards and all matters and things appertaining thereto."

For many hundred years before this statute, churchwardens were a body corporate whose duties and rights included that of taking care of the goods, repairs, and ornaments of the church: Phillimore's Ecclesiastical Law, pp. 1054, 1465; *Stutter v. Freston*, 1 Str. 52.

They have only the custody of the church building under the minister. If he refuses access to the church, complaint must be made to higher authority: Phill. 1464.

As such corporation they have a special property in distinction to a mere charge, in the organ, bells, bell-ropes, books, vestments, ornaments, and all other goods and chattels belonging to the church which come to them by virtue of their office, and may prefer indictments and sue and be sued in respect of them as a corporation. See Phill. 1484; *Prideaux's Churchwarden's Guide*, 55, 423, et seq.; *Jackson v. Adams*, 2 Bing. N. C. 402; *Morse v. Thorniley*, 4 W. R. 514.

It is also in the power of churchwardens in their corporate capacity to make reasonable agreements beneficial to the parish and thereby to bind the parishioners and their successors as also succeeding churchwardens. . . .

[*Martin v. Nutkin*, 2 P. Wms. 266, Phill. 1484, *Brooke's Churchwarden's Guide*, pp. 105-108, referred to.]

That the agreement in question here must have been regarded by the churchwardens and vestry as of great value to the parish, I think is manifest from the following facts found by the arbitrator: "Mr. Kirkby had been incumbent of the rectory of All Saints church, Collingwood, for about twenty-one years, during the last three years of which period a strong feeling had developed against him in the parish, until by the spring of 1900 a very considerable majority both of the vestry and of the congregation were desirous of a change, and had been doing all in their power to bring this about, and had been agitating in that direction for some time previously. At the Easter vestry in 1898, the rector's stipend had been reduced from \$900 to \$200 per annum, and at the Easter vestry of 1899 a reduction to \$1 per annum had been decided on by resolution of the vestry."

Under this most extraordinary state of affairs I must hold that an agreement by which the churchwardens were enabled without litigation or further injury to the well-being of the parish to obtain possession of the church and rectory and secure the incumbent they desired, must be treated as an agreement highly beneficial to the parish, and therefore an agreement the making of which was incidental to the corporate duties and powers of churchwardens, within the above authorities, and binding upon the churchwardens and their successors.

Let the award therefore be enforced under sec. 13 of the Arbitration Act, except as to the item of \$50 for interest.

There will be no costs of this motion.

CARTWRIGHT, MASTER.

SEPTEMBER 7TH, 1904.

CHAMBERS.

BANK OF HAMILTON v. ANDERSON.

Dismissal of Action—Default of Election under Order—Appeal—Extension of Time for Election after Default.

By order of 9th March, 1904 (3 O. W. R. 301), the plaintiffs (the bank and E. R. C. Clarkson) were directed to elect within one month which of the two should proceed with this action, making all necessary amendments consequent on such election; and that in default of such election and amendment "within one month from the date hereof this action be dismissed with costs."

On 28th March an appeal from this order was dismissed by MACMAHON, J. (ib. 389), whose decision was affirmed by a Divisional Court (ib. 709) on 3rd June. The month limited by the first order expired on 8th April. No extension of time was granted by either of the subsequent orders.

On June 29th H. E. Rose, for plaintiffs, moved to extend time for making their election.

G. H. Kilmer shewed cause and objected that the Master had no power to grant the motion, relying on the decision in *Crown Corundum and Mica Co. v. Logan*, 3 O. L. R. 434, 1 O. W. R. 107, 174.

THE MASTER.—Unless there is some essential difference between an order to dismiss for want of prosecution and the order made in this case, I think Mr. Kilmer's contention must prevail.

Now, I am unable to see any such difference. No doubt what was urged by the counsel for the plaintiffs before the Divisional Court puts the matter in a strong light; and the spirit of the Judicature Act is disregarded if "substantial justice is sacrificed to a wretched technicality." Here, however, the whole difficulty has arisen from the oversight of the solicitors, who could have obtained the necessary enlargement from Mr. Justice MacMahon or from the Divisional Court, had the matter been mentioned on either argument.

After all, the question is one of very little practical importance. It would have cost less to have begun a new action; and, as the Milton assizes are not earlier than the 7th November, there would have been and still is ample time to go to trial at those sittings.

Had there been any question of the intervention of the Statute of Limitations or any such state of facts as in *Collinson v. Jeffery*, [1896] 1 Ch. 644, I would feel much more difficulty in refusing what would seem reasonable, if there was any power to make the order asked for.

The motion must be dismissed with costs.

CARTWRIGHT, MASTER.

SEPTEMBER 7TH, 1904.

CHAMBERS.

MCBAIN v. WATERLOO MANUFACTURING CO.

Infant—Next Friend—Father out of Jurisdiction—Security for Costs—New Next Friend.

Motion by defendants to stay the action until the plaintiff should name a next friend in the jurisdiction or give security for costs. The plaintiff sued by his father as next friend; both resided in the Province of Quebec, as appeared by indorsement on the writ of summons.

D. L. McCarthy, for defendants.

J. E. Jones, for plaintiff.

THE MASTER referred to *Topping v. Everest*, 2 O. W. R. 744, and cases there cited, especially *Scott v. Niagara Navigation Co.*, 15 P. R. 409, 455, and continued:

I think defendants are entitled to have their order. The next friend of an infant plaintiff stands in the same position as any other litigant. Any indulgence is given to the infant and not to the next friend.

In all the reported cases the next friend was resident within the jurisdiction. In such an event security for costs was always refused. But how can a resident out of the jurisdiction be said to be before the Court?

If, for any reason, the infant's father does not wish to give security, and no other person can be found in the jurisdiction willing to act, then, as was said in *Taylor v. Wood*, 14 P. R. at p. 456, the Court has power to appoint the official guardian to act as next friend in the case of commendable litigation. The only thing that looks the other way is the remark of Meredith, J., in *Scott v. Niagara Navigation Co.*, 15 P. R. at p. 455. That, however, does not seem intended to be a positive expression of opinion on the point now under consideration. . . .

The order should go that some other next friend be appointed resident in Ontario, unless the father gives the usual security for costs.

The costs of this motion will be in the cause.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING SEPTEMBER 17TH, 1904.)

VOL. IV. TORONTO, SEPTEMBER 22, 1904. No. 4

MAGEE, J.

SEPTEMBER 12TH, 1904.

CHAMBERS.

RE EWART CARRIAGE WORKS LIMITED.

Company—Winding-up—Petition for—Insufficient Allegations—Evidence—Affidavits—Amendment—Terms.

Petition by the Dunlop Tire Co. for an order for the winding-up of the Ewart Co. under the Dominion statute.

C. S. MacInnes, for petitioners.

S. B. Woods, for company.

MAGEE, J.—The company is a trading company, incorporated under the Ontario Joint Stock Companies Act on 19th February, 1903, among the objects of that company being to acquire the business of James Ewart. The nominal capital was \$100,000 in 1,000 shares, of which 294 were subscribed and 133 paid up. Of the \$16,100 owing upon subscribed shares a sum of \$500 is said to be owing by one director and \$400 by another; \$15,000 by Mr. James Ewart, described as manager, who holds 250 shares; and it is alleged by the petitioners that another shareholder, Mr. Boules, described as secretary, really subscribed for \$3,000 of stock, although only appearing as holder of \$1,000 fully paid. . . .

The petitioners are judgment creditors for \$205.84, made up of \$193.97 debt and \$11.87 costs, their judgment being recovered on 9th July, 1904.

The petitioners allege that a writ of *fi. fa.* was issued on 9th July, 1904, under their judgment, and that the Ewart Co. permitted the execution so issued against them, and under which their goods, chattels, lands, and property were seized, to remain unsatisfied for more than 15 days after the

seizure of such goods by the sheriff, and that the judgment and execution are wholly unsatisfied; that the Ewart Co. are unable to pay their debts as they become due.

The petitioners also allege that they are not aware of the facts relating to the subscription and payment of the stock, and are desirous that the affairs and business of the company and the subscription and payment of the stock should be investigated upon oath, and that it should be made to appear, etc.

In support of the petition is filed an affidavit by the petitioners' solicitor that their judgment was recovered on 9th July, and execution placed in the sheriff's office on 11th July, and that the deponent is informed by the sheriff that in accordance with the execution he proceeded to make a seizure of the goods, chattels, and property of the company, but found that they were claimed under a chattel mortgage to the Metropolitan Bank, and the said judgment still remains unsatisfied in the hands of the said sheriff, and he states that his return to such execution must be nulla bona.

An affidavit by petitioners' secretary, verifying the petition in general terms, states, on information received from petitioners' solicitors, that on 11th August, 1904, Mr. Reinhardt, the president of the company, was represented by counsel on the application of the petitioners to wind up the company, and that counsel for Reinhardt read an affidavit made by Reinhardt . . . that the company were not doing any business for the reason that their assets other than the unpaid subscriptions had been sold and disposed of by the mortgagees, and the company owed him, Reinhardt, over \$800, besides the company's indebtedness to him as accommodation indorser, and he had paid \$1,000 already on behalf of the company as accommodation indorser. . . .

The affidavit of Mr. Bullock states that he is a creditor for \$100 on the company's promissory note for \$100 due 18th July, and he believes there are other creditors; . . . that a chattel mortgage on the property of the company purports to have been given on 22nd December, 1903, to the Metropolitan Bank, and he was informed by the secretary of the company and believes that it was made without due authority from the shareholders, no meeting of shareholders having been called for passing the by-law under which the chattel mortgage was alleged to have been made. . . .

On the facts set out in the affidavits I would consider it desirable in the interests of the outside creditors that a winding-up order should issue. The amounts owing from

two or three directors, the claim of another, the mortgage without authority from shareholders, and the absence of available assets so soon after the company's organization, are circumstances which render it reasonable for creditors to ask that the control of the company's affairs be not left with the directors. . . .

Counsel for the petitioners contended that they were entitled to an order under clauses a, d, g, and h of sec. 5 of the Act.

As regards clauses d and g, even if there were proof of facts to bring the company within either, there is no allegation of such facts in the petition, nor even a general allegation of insolvency of the company, but only of particular facts not coming under either of these two clauses. In *In re Wear Engine Works Co.*, L. R. 10 Ch. 188, an order was refused on that ground; and see also *In re Briton Medical and General Life Assn.*, 11 O. R. 478; *Re Grundy Stove Co.*, 7 O. L. R. 252, 3 O. W. R. 175.

As to clause h, there is here no evidence of a seizure. The petition alleges a seizure, but the solicitor's affidavit only states that the sheriff informed him he proceeded to make a seizure but found that all the goods, etc., were claimed under a mortgage, and his return must be *nulla bona*. This would imply that no seizure was in fact made. Even if this proceeding to make a seizure could be interpreted as the making of one, there is nothing to shew where it took place or that 15 days had elapsed. The secretary's affidavit verifying the petition in general terms, on information and belief, cannot be taken as sufficient, especially as the sources of the information are given, and manifestly do not relate to that fact.

As to clause a, the petition makes a direct allegation under that clause of the company's inability to pay their debts as they become due, but no evidence is given of a demand in writing and neglect by the company to pay within 60 days thereafter, as required by sec. 6, which specifies when the inability to pay debts shall be deemed to exist. In *In re Qu'Appelle Valley Co.*, 5 Man. L. R. 160, and *In re Rapid City Farmers' Elevator Co.*, 9 Man. L. R. 574, it was held by Taylor, C.J., that sec. 6 specifies the only way of bringing the case under clause a of sec. 5—a view apparently taken also by Proudfoot, J., in *In re Briton Medical and General Life Assn.*, 11 O. R. 478, and in which I concur. In England other proof is sufficient, as sec. 80 of the Companies Act only requires it to be to the satisfaction of the Court.

On the petition as it at present stands and with the present proof, I do not see my way to grant an order, but, as it appears to be a case in which the company should be wound up, the petitioners may, if they so desire, amend the present petition and offer such additional evidence as they may be advised and again present it within 14 days. In such case the costs of the present application and of the application to Idington, J., are reserved to be disposed of on that application. Failing that, the present application is dismissed with costs, the costs of the company in opposing the petition as at first presented being fixed at \$5.

CARTWRIGHT, MASTER.

SEPTEMBER 13TH, 1904.

CHAMBERS.

GEIGER v. GRAND TRUNK R. W. CO.

Parties—Joinder of Defendants—Separate Causes of Action—Personal Injuries—Negligence—Breach of Contract to Carry Safely—Railway Company—Breach of Statutory Duty.

Motion by defendants the Canadian Transfer Co. for an order requiring plaintiffs to elect against which of the two defendants they would proceed in this action.

The statement of claim alleged (3) that on 21st July, 1904, plaintiffs were being carried for reward by defendants the transfer company, in their omnibus, from the Yonge street wharf to the King Edward hotel, in the city of Toronto; but that (4) the said company so negligently and unskilfully conducted themselves in the management of their omnibus that it came into violent collision with two cars of defendants the railway company, where their railway crosses Yonge street, and the omnibus was caught between the cars and wrecked; (5) that defendants the transfer company were negligent in attempting to cross the railway track while the servants of the railway company were shunting and coupling cars, and also in not crossing at a greater speed; (6, 7, 8) that the crossing was dangerous in the highest degree to the thousands who have to cross Yonge street at that point, and that the railway company gave no warning in any way nor took any precaution, by reason whereof the collision occurred; (9) that the acts of the transfer company and the acts of the railway company were negligent and unskilful and occasioned the collision, whereby plaintiffs sustained serious injuries and damage.

B. N. Davis, for defendants the transfer company, relied on *Hinds v. Town of Barrie*, 6 O. L. R. 656, 2 O. W. R. 995, where all the cases are cited and discussed.

D. L. McCarthy, for defendants the railway company, submitted to any order that might be made.

W. M. Boulton, for plaintiffs, contended that paragraph 6 of the statement of claim took the case out of the principle of *Hinds v. Town of Barrie*.

THE MASTER.—I am of opinion that the motion must succeed and an order be made as in *Andrews v. Forsythe*, 7 O. L. R. 188, 3 O. W. R. 307. It seems reasonably clear that plaintiffs in their statement of claim set up two separate causes of action against separate parties. They first charge breach of contract by the transfer company and then breach of statutory duty by the railway company.

It is true that in paragraph 9 they attempt to set up a joint cause of action against both defendants, but not more successfully than in *Hinds v. Town of Barrie*. . . .

Either the transfer company were right in trying to cross the track when they did, or they were wrong. If the latter, plaintiffs should proceed against them; if the former, then against the railway company. As said by the Chancellor in *Quigley v. Waterloo Mfg. Co.*, 1 O. L. R. 613, 614, plaintiffs must make up their mind whose neglect was the causa causans of the serious injuries they undoubtedly suffered. . . .

Scott v. London, etc., Docks Co., 3 H. & C. 596, would seem to shew that plaintiffs would prima facie have a good cause of action against the transfer company, and that they can safely leave it to that company to exculpate themselves if they can do so. If the railway company were in fault, the transfer company would clearly have a remedy over against them. . . .

CARTWRIGHT, MASTER. SEPTEMBER 14TH, 1904.
CHAMBERS.

BLACKLEY v. ROUGIER.

Particulars—Statement of Claim—Action for Commission on Sales of Goods—Information in Possession of Defendants.

Motion by defendants for particulars of the statement of claim. The action was to recover \$8,472 as the balance due

to plaintiff for commissions earned by him as traveller for defendants in 1900 and three following years.

The writ of summons was indorsed as follows:

Jan. 1, 1904. Total gross accepted orders.....	\$213,225
Less cancelled orders	\$13,500
Less returned goods	16,500
Less cash discounts	9,000
	39,000
	\$174,225

10 per cent. commission on \$145,000—\$14,500

5 per cent. commission on \$29,000— 1,450

\$15,950

Cr. By cash received at various dates net. 7,478

Balance due\$8,472

And interest till judgment.

The result was similarly set out in the statement of claim.

Plaintiff stated on affidavit that in the course of his service with defendants he gave them a voucher in writing for every item of his claim in this action, and that he believed these vouchers were still in defendants' possession or power.

The defendants stated on affidavit that any particulars obtained from plaintiff while acting as defendants' agent were not sufficient to enable defendants to understand how plaintiff's claim was made up.

A. R. Clute, for defendants.

F. J. Roche, for plaintiff.

THE MASTER referred to Tawse v. Seguin, 1 O. W. R. 14, 56, and proceeded:

In the present case plaintiff does not allege any difficulty in furnishing the particulars asked for. It is clear he must give them at some stage if he is to succeed in his action. On the other side, defendants do not deny that all necessary information can be found in their own books. . . .

It might be thought that defendants could satisfy themselves whether to defend the action or not, without further particulars. But they say they cannot. And perhaps they are entitled to see a full statement of account, which might lead them to pay into Court such a sum as plaintiff would be willing to accept, and so the litigation would be at an end.

I therefore, though not wholly free from doubt, think it best to make as full an order for particulars as was made in *Tawse v. Seguin*. Such particulars would be the same as the accounts which plaintiff on a reference would bring into the Master's office.

Plaintiff must have full access to defendants' books for this purpose, if necessary, though I infer he has sufficient memoranda in his possession.

Costs will be in the cause.

ANGLIN, J.

SEPTEMBER 14TH, 1904.

CHAMBERS.

BLEASDELL v. BOISSEAU.

*Judgment—Set-off of Judgment Purchased by Defendants—
Equitable Right—Discretion—Attachment of Debts.*

The plaintiff, on 29th January, 1904, recovered judgment for \$450 and costs against the defendants; on 1st February he assigned that judgment for value to one Dickson. Dickson's purchase was made bona fide and without notice of any outstanding judgment against his assignor. The accountant of the Supreme Court, in June, 1895, had recovered judgment upon a mortgage covenant against plaintiff and one Lester for \$4,393.06, which remained unsatisfied. On 29th January, on behalf of the accountant, an attaching order was obtained and served upon defendants. By indenture bearing the same date the accountant purported to assign to defendants "the said judgment and all moneys due or to grow due by virtue thereof against the said William H. BleasdeLL." Notice of this assignment was given to plaintiff and to his solicitors on 3rd February, but plaintiff was not notified of the garnishee proceedings. The garnishee order fixed 3rd February for the hearing of the judgment creditor's application for payment by the garnishee, but no such motion was made on that or any subsequent day. Defendants, having taken the assignment above mentioned, appeared thereafter to have relied entirely on whatever rights they had thus acquired. On 20th February they moved before the Master in Chambers for an order that plaintiff's judgment against them be set off pro tanto against the judgment of which they had become assignees, and also for an order "disposing of the garnishee order served upon them." On 23rd April the Master made the order for set-off, subject to the lien for costs of plaintiff's solicitors, and discharged the garnishee summons, which, he said, "was practically merged in the

assignment." From this order the assignee, Dickson, appealed. In the event of his appeal succeeding defendants claimed the benefit of the garnishee process, which their solicitor swore "was never in any sense abandoned, but was expressly preserved by arrangement with the solicitors for the accountant."

C. A. Moss, for appellant.

W. E. Middleton, for defendants.

ANGLIN, J.—The right of set-off, under such circumstances as exist in this case, is purely equitable: *Lynch v. Wilson*, 3 P. R. 173; *Booth v. Walton*, 44 U. C. R. 500. Defendants, who, "instead of paying to the plaintiff what he had recovered, expended money which might have been so employed in buying up a judgment" against him, are not entitled to ask the Court to exercise its equitable powers to assist them in this attempt to defeat plaintiff's recovery: *Elliott v. Crocker*, 1 P. R. 13.

Neither do I think I should assist defendants by reinstating the garnishee summons, which the Master has discharged. A hardship, if not an injustice, to Dickson would certainly follow, and unless bound to do so, and I think I am not so bound, I am not disposed, with such consequences to an innocent party, to help defendants, who have voluntarily put themselves in their present position, to virtually defeat a meritorious claim, payment of which the learned Chief Justice of the Common Pleas, who tried this action, thought should never have been resisted.

I assume, as did both counsel on the argument, that the document of 29th January did not operate to transfer the liability of Lester under the judgment in "*Accountant v. Plummer*."

If the liability of Bleasdel has been effectively assigned to defendants—and before so holding I should be obliged to consider with great care Mr. Moss's able argument to the contrary—attempting to enforce, as assignee, by garnishee proceedings, the judgment establishing that liability, whether in his own name or in that of his assignor, the defendants in reality seek to attach moneys in their own hands to satisfy their own claim. This in itself seems anomalous. Moreover they would thus, indirectly, but most effectively, accomplish the set-off, which, in my opinion, any discretionary powers which the Court possesses should be employed to prevent. If the liability of Bleasdel under the judgment in favour of the accountant has not been effectively transferred, the accountant alone can properly proceed to enforce that

judgment by attachment, and he is not a party to this application.

The appeal of plaintiff will be allowed with costs.

ANGLIN, J.

SEPTEMBER 14TH, 1904.

WEEKLY COURT.

RE KINCARDINE SCHOOL SECTIONS.

*Public Schools — Boundaries of School Sections — By-law—
Petition—Award — Powers of Arbitrators — Finality of
Award—Order Setting aside Award as to one School Section
—Effect on Others.*

Motion by the trustees of school section 5 of the township of Kincardine to set aside the award of arbitrators appointed by the county council of Bruce under sec. 42 of the Public Schools Act, 1 Edw. VII. ch. 39, determining the boundaries of certain sections.

W. H. Blake, K.C., for the applicants.

C. A. Moss, for the trustees of sections 6 and 12.

No one appeared for the trustees of section 15, who were notified.

ANGLIN, J.—School section 8, upon notice to section 5, which however did not appear, but without notice to sections 6 and 12, obtained on 28th April, 1904, an order setting aside the award in question “so far as it purports to affect section 8, or the boundaries thereof, or the lands therein contained.” The net result of this order is, that a large tract of land, taken by the award from section 8 and added to section 5, is restored to section 8. The award had deprived section 5 of other lots given to it by the by-law of the township council, and had annexed these lots to sections 6 and 12, with which they remain, leaving section 5 too small, the trustees allege, to be a workable school section. They now ask an order declaring that the order of 28th April operates to set aside the award so far as it affects section 5. The respondents contend that the order of 28th April, because made without notice to them, cannot thus affect their position under the arbitrators’ award.

This award was duly published on 18th January, 1904. By sec. 55 of the Public Schools Act, no notice to set it aside having been filed in the office of the township clerk within one month of its publication, notwithstanding any defect in

substance or form, or in the manner or time of making the same, the award is made valid and binding for a period of at least 5 years. This statutory provision excludes all objections save such as are based upon lack of jurisdiction in the arbitrators.

If wholly untrammelled by authority, I should be disposed to construe liberally and broadly the provisions of sec. 42, in order to enable the arbitrators appointed by the county council finally to settle the matters complained of in whatever manner seemed to them fair and equitable. But these provisions have already received judicial consideration, and I am bound to regard the limitations within which the powers of such arbitrators have been held to be restricted. . . .

[Re Southwold School Sections, 3 O. L. R. 81, 1 O. W. R. 32, and In re Sydenham School Sections, 6 O. L. R. 417, 7 O. L. R. 49, 2 O. W. R. 830, 3 O. W. R. 227, referred to.]

In each of these cases the appeal referred for hearing to the arbitrators was from the refusal of the township council to grant the prayer of a single petition. In the present case the township council had before it several petitions. Some requested that there be no change in boundaries; others asked the formation of sections which would permit of the establishment of line schools; others prayed for certain defined sections. The township council having passed by-law 162, determining certain boundaries, four appeals were taken to the county council "against by-law 162 of the township of Kincardine in regard to the boundaries of our school section." Each of these appeals was by 5 ratepayers from one of the following sections, 5, 6, 7, 12.

The arbitrators do not appear to have travelled outside the subject matter of appeals couched in such general terms against a by-law passed after the presentation of such varied petitions. The facts of the present case are, I think, clearly distinguishable from those before the Court in each of the two earlier cases cited above. I do not regard the award in the present instance as a mere promulgation of the views of the arbitrators outside of the scope of the reference to them, but rather as a settlement of the matters complained of upon the appeals to the county council, within the spirit and letter of sec. 42 (3) of the Act.

The difficulty in which section 5 now finds itself is the result of its own neglect or indifference. The trustees of that section were notified of the application made by section 8. They saw fit not to attend upon the motion . . . and allowed the order, of the consequences of which they now

complain, to go by default. Had they taken the trouble to attend and shew cause, that order might not have been made. Had they then called the attention of the Court to the effect of the order sought upon their own position, and to the facts that the scheme of the award is such that it should stand as a whole or not at all, and that if the application of section 8 were granted it should only be upon a corresponding measure of relief being afforded to section 5, which would involve interference with the rights of sections 6 and 12, I cannot conceive that any disposition would have been made of that application without notice to all the other school sections interested in or affected by the award.

Section 7, an appellant to the county council, has apparently not been notified of this motion.

Being of the opinion that the arbitrators have not exceeded their statutory powers, I must dismiss this application, and the applicants must pay the costs of the respondents.

SEPTEMBER 17TH, 1904.

C.A.

RE TOWNSHIP OF ALDBOROUGH AND TOWNSHIP OF DUNWICH.

*Municipal Corporations—Drainage—Report of Engineer—
Appeal to Drainage Referee—Appeal to Court of Appeal—
Status of Appellant—Landowner—Township Corporation
—Right of Appeal — Amount of Assessment — Scope of
Report—Petition — Extent of Drainage Area — Enlarge-
ment — Multiplication of Drains — Injury to Lands—
Absence of Benefit—Unjust Assessment—Outlet.*

Appeal by the corporation of Aldborough and Alexander Sellars from the order or judgment of the Drainage Referee dismissing their appeals from the report, plans, etc., of James A. Bell, C.E., relating to what is called the McAllister drain in the townships of Dunwich and Aldborough.

M. Wilson, K.C., and A. Grant, St. Thomas, for appellants.

C. St. Clair Leitch, Dutton, for the corporation of Dunwich, respondents.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

GARROW, J.A.—I do not understand why it was considered necessary for Mr. Sellars to appeal, nor, as the proceeding is purely statutory, where he finds authority for appealing. Section 63 of the Municipal Drainage Act authorizes an appeal by the municipality served, as provided by sec. 61, but does not, I think, authorize or contemplate any other appeal. The matter is not of moment, perhaps, because the appeal of the township, if successful, will enure to the benefit of Mr. Sellars as one of the resident ratepayers assessed for the proposed drainage work.

Objection was taken by respondents that the appeal was not in time or in proper form, but I agree with the learned Referee that this objection is not well founded.

It was also objected that, the assessment being under \$1,000, there was no right of appeal. Section 63 contains the provision respecting the right of appeal. The argument of the respondents' counsel would require us to carry forward into clause (b) the words found in clause (a), "where the assessment against the appealing municipality exceeds \$1,000." But such a construction would, I think, be against the plain intention to provide specifically, as is done in clause (a), for the case of assessments exceeding \$1,000, and generally for all other cases, including assessments below \$1,000, as is done in clause (b). Any other construction would take away altogether all right of appeal where the assessment is under \$1,000.

As applied to the facts, the appeal in the present case is to be treated as falling within sub-clauses 3 and 4 of clause (b), that is, (3) that the initiating municipality should not be permitted to do the work within the limits of the appealing municipality, and (4) that the assessment is illegal, unjust, or excessive.

The appellants contend that the petition did not authorize the report; that in fact the engineer had provided for a much more extensive work than the petition contemplated. If this point was open to the appellants at all, and it probably was, I should be against giving effect to it on the facts.

The appellants also contend that the drainage area was too extensive, that lands in Dunwich were included which had not the right in nature to drain towards the drain in question, but I am also against this objection on the facts. It may be that upon a strict levelling of the surface some

water will come to the proposed works which without aid would not reach them. But the territory is evidently not one in which the watersheds are well defined, and absolute exactness is not, therefore, to be expected, and cannot, in my opinion, under such circumstances, be demanded under the statute. . . .

The McAllister drain was originally constructed under the Ditches and Watercourses Act. It began in the township of Dunwich, and crossing the town line passed into the township of Aldborough, with an outlet in the latter township into what is called the government drain in lot 24 in the 4th concession, in its course through the latter township passing through the farm of the appellant Alexander Sellars. Before its construction Mr. Sellars had constructed a private main drain practically along the same course, into which he had carried a large number of lateral drains, all of tile, as is also his main drain. The evidence, in my opinion, shews that this system of drainage was sufficient for the purpose of draining his own land. He was, however, assessed for a portion of the cost of the McAllister drain, and did not appeal. The municipal council of the township of Dunwich afterwards, upon petition under sec. 84 of the Municipal Drainage Act, assumed the McAllister drain, and in the proceedings now in question proposed very considerably to enlarge the drainage area entitled to use the original drain. The proposal included using the original award drain through the Sellars lot as it stands, with the addition of an open or flood drain over practically the same course, so that, if carried out, the lands of Mr. Sellars would be burdened, first, with his own main drain, second, with the McAllister or award drain, and third, with a wide, open, shallow drain upon the surface, all proceeding within a few yards of each other, the last two almost, if not entirely, for the benefit of the lands in the township of Dunwich. He constructed his own drains at his own expense, of course; he was assessed for the construction of the award drain in labour and material; and now he is again assessed, although not for a large sum, for the proposed flood drain. And it is proposed in the report that he shall also remain liable to repair in proportion to his assessment. He says, and the evidence, I think, bears him out, that the award drain, instead of being of benefit, has injured his lands; that it has brought water upon rather than carried water away from him; and that the proposed open drain will be a serious injury to his lands and of no benefit; and that there is great danger that his whole drainage system will be imperilled, if not destroyed,

by placing the open ditch across or over his tile drains below. I am of the opinion, on the evidence, that his apprehension is well founded—that his assessment is, if not illegal, at least unjust, a characterization which, in my opinion, applies to all the assessments in the township of Aldborough; and for these reasons that the work as projected through that township should not be allowed to proceed. . . .

The township of Dunwich have, of course, the right by proper proceedings to obtain access to the outlet in the township of Aldborough for their drainage, but they have no right to burden the lands in the latter township with an unnecessary number of drains, or to put the latter township or its inhabitants to any expense or loss in the course of so doing either for construction or maintenance. . . .

As it appears to me, the proper course would be to provide one tile drain of sufficient size to carry off all the water required, into which Mr. Sellars's laterals could also empty, and to abandon altogether the proposed surface drain, which, as I read the evidence, is only intended to carry the surface water before the frost leaves the ground, when in fact it can do little or no harm.

As matters stand, I think the appeal must be allowed with costs.

CARTWRIGHT, MASTER.

SEPTEMBER 19TH, 1904.

CHAMBERS.

CANTIN v. NEWS PUBLISHING CO. OF TORONTO.

Discovery—Examination of Past Officer of Company—Rule 439 (a)—Rule 485.

Motion by plaintiff for an order for the examination for discovery in an action for libel of a newspaper reporter formerly in the employment of defendant company as an officer of the company. The reporter wrote the article for defendants' newspaper which plaintiff complained of, and was still in their employment when the action was brought, but had left the defendants nearly a year before the motion.

W. N. Ferguson, for plaintiff.

T. Reid, for defendants.

THE MASTER.—The language of Rule 439 (a), as amended by Rule 1250, does not provide for the present case. Whether the words allowing examination of a past officer were omitted intentionally or not, it is clear they have gone. If this was in any way a mistake, no doubt it will be remedied on attention being called to it in the proper quarter.

Mr. Ferguson submitted that there was power to order this examination under Rule 485. He sought to distinguish *Beaton v. Globe Printing Co.*, 16 P. R. 281, on two grounds: first, that the argument of Mr. Justice Osler (at p. 283) overlooked the language of Rule 7; and second, that all that had been decided was that Rule 485 did not allow the examination for discovery of a party before the usual time. But, looking at the whole judgment, I do not think it is to be limited in that way. The whole question is gone into both as to parties and witnesses, and it is laid down that the Rule gives no power to make such an order as was there in question (pp. 286 and 285, last paragraph). . . .

The motion fails and must be dismissed. The costs will be in the cause, as the point arises now for the first time.

SEPTEMBER 19TH, 1904.

DIVISIONAL COURT.

HEMPHILL v. TOWNSHIP OF HALDIMAND.

Way—Non-repair—Objects Placed on Highway—Neglect of Municipality to Remove—Frightening Horse—Liability—Character of Horse—Contributory Negligence.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., 3 O. W. R. 605, dismissing action.

W. J. Tremear, for plaintiff.

E. C. S. Huycke, K.C., for defendants the Gaffields.

THE COURT (MEREDITH, C.J., IDINGTON, J., MAGEE, J.), dismissed the appeal with costs, agreeing with the judgment of FALCONBRIDGE, C.J.

SEPTEMBER 19TH, 1904.

DIVISIONAL COURT.

LAWS v. TORONTO GENERAL TRUSTS CORPORATION.

Mortgage—Account—Payments Made by Mortgagees—Money Paid for Improvements—Commission to Solicitor on Sale of Mortgaged Premises.

Appeal by plaintiffs from order of STREET, J., 3 O. W. R. 634, on appeal from Master's report.

E. E. A. DuVernet, for plaintiffs.

G. F. Shepley, K.C., for defendants.

THE COURT (MEREDITH, C.J., IDINGTON, J., MAGEE, J.), dismissed the appeal with costs. for the reasons given by STREET, J.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING SEPTEMBER 24TH, 1904.)

VOL. IV. TORONTO, SEPTEMBER 29, 1904. No. 5

SEPTEMBER 19TH, 1904.

C.A.

WOODRUFF v. ECLIPSE OFFICE FURNITURE CO.

Patent of Invention — License — Royalties — Assignment of License by Licensees—Formation of Company—Contract to Pay Royalties—Statute of Frauds—Consideration.

Appeal by defendants from judgment of MEREDITH, C.J. (2 O. W. R. 691) in favour of plaintiff upon the findings of a jury.

Action to recover royalties at the rate of \$300 per annum for the years 1896, 1897, 1898, and 1899, alleged to be due by defendants for the manufacture and sale by them, under license from plaintiff, of a certain patented invention belonging to him.

A. W. Fraser, K.C., for appellants.

F. A. Magee, Ottawa, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

OSLER, J.A.—There are two questions to be considered. The first is, whether any agreement was proved by which defendants were bound to pay the royalties for the whole or any part of the period sued for. The trial Judge held that there was, and gave judgment for plaintiff for the full amount for the years 1896, 1897, 1898, inclusive, and for the year 1899 up to the date of the expiration of the patent, at the rate of 10 cents for each article manufactured during that year \$234, or in all \$1,134. The other question is, whether the articles in respect of which the royalties are claimed were in fact manufactured under the license, or whether as

to some or all of such articles plaintiff's remedy must be sought in an action for the infringement of his patent. This question, from the view taken of plaintiff's rights in other respects, was not dealt with in the Court below.

It appeared that plaintiff was the patentee of an invention called an "improvement in document and letter files or holders." His patent was granted 15th November, 1889, and remained in force, having been once renewed, for ten years thereafter.

He granted to one Gottwalls, on 5th March, 1891, a license to manufacture in Canada during the life of the patent, for a royalty of 10 cents per holder, and a minimum, for the first year commencing 1st April, 1891, of \$200; for the second year, of \$300; for the third year, of \$400; and for the fourth year, commencing 1st April, 1895, and each following year, of \$500. The terms of this agreement need not be further referred to, as, except as to dates and amounts, they were the same as those of the agreement next to be mentioned, which appears to have been substituted for it. Gottwalls soon afterwards entered into partnership with one Orme under the name of Gottwalls & Co., and by an agreement under seal bearing date 1st June, 1892, between plaintiff and Gottwalls & Co., duly executed by both parties, plaintiff granted to the firm a license to make, use, and sell in the Dominion of Canada, document and letter files or holders containing the said improvement, upon the following conditions and considerations, viz., the licensees to pay, and they thereby agreed to pay, a royalty of 10 cents for each file or box holder containing the improvement, made by them in Canada or elsewhere; 2nd, the licensees to render a monthly statement of all files sold, and to pay the royalty within thirty days thereafter; 3rd, during the first year, beginning on 1st June, 1892, the royalty not to be less than \$200, even though less than 2,000 files sold, and during the second and following years the royalty not to be less than \$300; 4th, the license not to be transferable without consent of the licensor; 5th, the agreement, contract, and license were to last for the lifetime of the patent and any extension or renewals thereof, provided that the foregoing conditions were observed and kept, unless their observance was expressly waived by plaintiff.

By indenture dated 10th February, 1893, reciting the agreement of 1st June, 1892, Orme, with the assent of plaintiff, assigned to Edward Seybold and James Gibson his interest in the said invention and all his right, title, and interest in and to the said agreement, and the covenants and

conditions therein contained, and all benefit and advantage to arise therefrom.

Articles bearing the last mentioned date were entered into between Seybold, Gibson, and Gottwalls, who formed a partnership under the name of "Eclipse Office Furniture Co." for carrying on the business of the manufacturing of files, cabinets, and office furniture. Part of the assets brought into the partnership consisted of the last mentioned license to manufacture plaintiff's invention, though there was no formal consent by plaintiff to its transfer to the new firm, nor any express reference to it in the articles.

On 24th April, 1893, a new partnership was formed under the same name, by the introduction of other partners, with a view to the incorporation of a joint stock company, the manufacturing of the invention being continued by them as if under the license.

In June, 1893, the partners procured such a company to be incorporated under the name of the "Eclipse Office Furniture Company, Limited," for the purpose, inter alia, of acquiring and extending the business theretofore carried on by the partnership. Letters patent incorporating defendants were issued on 28th June, 1893. And on 12th July, 1893, the partners, by deed, assigned and transferred to the company their interest in the business, together with "all the goods, chattels, patents of invention, goodwill, book debts, and other assets of the business."

There was no formal assent by plaintiff to this transfer or to that of 24th April, 1893, but the manufacture of the invention was continued, and it is to be assumed that plaintiff was satisfied, in some way, for his royalties up to the end of the year 1893. In March, 1894, Seybold, the general manager of the company, went to Washington, D.C., and proposed to plaintiff a new agreement and license, which was afterwards provisionally executed by the company and forwarded to plaintiff for acceptance.

This instrument, while in other respects like that of June, 1892, provided that "during the first year beginning on 1st January, 1894, the royalty so paid by the parties of the second part to the party of the first part should not be less than \$200, even though less than 2,000 file boxes or holders be so sold by the parties of the second part, and during the second and following years the royalty so paid should not be less than \$300," and it was further provided, differing in this respect also from the former agreement, that defendants should be at liberty to terminate the agreement at any time previous to the expiration of the patent, upon giving 12 months' notice in writing of their intention

t; do so. The agreement was sent to plaintiff for his consideration, and on 19th April he wrote defendants that he was advised by his attorney that "it would not be best for him to change the existing agreement."

On 31st January, 1895, defendants wrote plaintiff at Washington, enclosing a cheque for \$84.30, "being amount in full for royalty on document files for the year ending 31st December, 1894. We may say that the number of files sold has not amounted to 2,000, but under our agreement we pay you the full \$200, and have already remitted the following amounts;" specifying three sums amounting to \$115.70, as from 1st January to 7th November, 1894.

On 2nd February, 1895, plaintiff wrote acknowledging receipt of the cheque as "balance due in full for royalty on document holder for the year ending 31st December, 1894."

On 4th February, 1896, plaintiff wrote defendants thus: "Not hearing from you, I write to inquire when I may expect account and settlement of royalties for the year 1895 as per our agreement."

Defendants replied on 22nd February, 1896, with a statement shewing \$252.36 balance due plaintiff for the year 1895, after debiting themselves with royalty of \$300 for that year, and enclosing cash on account \$152.36. On 24th March, 1896, they remitted cheque for \$100, "being balance c^r account to 31st December, 1895." This was the last payment made by defendants, though they continued to manufacture the invention.

In the autumn of 1896 Seybold was again in Washington, where he had an interview with plaintiff, and told him that from that time forward the company would not pay any more royalties. The reason assigned for taking this stand was that the patent had, as defendants contended, become invalid in consequence of certain irregular importations, made as it would seem at the request of defendants themselves. They also demanded a return of the sum overpaid in the year 1896, but refused to pay anything more unless plaintiff would, as they said, come to terms, that is, accept ten cents royalty on each article then and afterwards manufactured, and repay the excess which had been overpaid qua minimum.

A letter of 17th November, 1896, from defendants to plaintiff was proved, referring to their recent interview in Washington, confirming the stand then taken by defendants, and asking for refund of the amount overpaid, "less what we are willing to keep to your credit on account of any future business." This letter does not seem to have been answered, but on 13th January, 1897, plaintiff wrote to de-

defendants a letter in which, after referring to the original agreement with Gottwalls, and the subsequent reduction of the minimum royalty payable, he says, "please inform me if you desire to continue the manufacture of my file-holders under the existing contract, which gives you exclusive right or license as covered by the Canadian patent." The letter was not answered, and nothing further passed between the parties until shortly before the commencement of the action. Defendants continued to manufacture, but rendered no accounts and paid nothing more on account of royalties.

The first difficulty in this case is to ascertain what was the real contract, if any, between the parties. When defendants came into existence as a corporation in June, 1893, there was no privity of contract between them and plaintiff in respect of the agreements of June, 1892, and 7th February, 1893, between Gottwalls and Gottwalls & Co. and plaintiff. They were not bound thereby, nor could they, by any dealings or contracts between themselves and their predecessors, adopt or ratify those agreements. The facts may shew that a new contract has been made between the parties directly upon similar or different terms, and it is to evidence of this kind that plaintiff must appeal.

It can hardly be necessary now to cite authority for this, but the cases of *Howard v. Patent Ivory Manufacturing Co.*, 38 Ch. D. 156, and *Bagot Pneumatic Tire Co. v. Clipper Pneumatic Tire Co.*, [1902] 1 Ch. 146, mentioned in the judgment below, and the recent case of *Natal Land and Colonization Co. v. Pauline Colliery Syndicate*, [1904] A. C. 120, may be referred to.

Defendants may have thought that they were bound by the contract of 1892, and their attempt to get plaintiff to accept the contract proposed by them in March, 1894, perhaps shews that they were under that impression. But they were not in fact liable upon it, and had done nothing from which a new contract in similar terms could be inferred. They had at most paid, as may be inferred, all that plaintiff claimed under it up to the end of 1893. But this would not bind them to pay royalties under it in the future, even though, under the mistaken assumption that they held plaintiff's license, they continued to manufacture his invention until March, 1894, when an agreement between plaintiff and defendants was proposed by the latter. Up to this time there was, as I have said, no agreement between the parties, though both of them perhaps, and certainly plaintiff, supposed that the agreement of 1892 was binding on them. Plaintiff refused to enter into the new agreement, but he

permitted defendants, and may be said to have licensed them by parol, to continue to manufacture his invention.

But on what terms? Not on those of the agreement of 1892, although at first sight it might seem so from his letter of 19th April, 1892. Something must have passed between the parties, the effect of which we can only infer from the correspondence of January-February, 1895. The agreement of 1892 is not referred to, but quite a different one, namely, an agreement to pay \$200 for royalties for the year ending 31st December, 1894. Not only is the yearly period for which the royalty was paid different, viz., January to December, instead of June to May, but the amount payable and paid for that year was \$200, instead of \$300, as it would have been under the agreement of 1892. Again, for the year 1895 we find in the subsequent correspondence the admission that the royalty was \$300, and was payable at the end of December, instead of May. There is no evidence that the agreement between the parties, whatever it may have been, or whenever made, contained any other terms than a license or permission on plaintiff's part to manufacture his invention, and on defendants' part to pay him the sums of \$200 and \$300 as royalties for the years 1894 and 1895 respectively. These terms so far correspond with those in the proposed agreement of 1894, but plaintiff's express and continued repudiation of that agreement precludes us from holding that it was ever accepted so as to make the other terms therein expressed binding on defendants. The Chief Justice does not so hold, and indeed upon the evidence could not have done so, but treats the words "our agreement" in the letter of 31st January, 1895, as referring to an agreement with plaintiff that he should receive from defendants the same royalties that Gottwalls & Co. had agreed to pay under the agreement of 1892. As I have pointed out, this can hardly be so, the periods for which they were paid, and, as to the first year at all events, the amount, being different.

As, however, defendants continued in 1896 and subsequent years to manufacture plaintiff's invention, I think that, if nothing else had occurred, it would not be difficult to infer that this was done under his continued license and assent, and that the sum paid for royalty for 1895 might properly be regarded as the measure of what defendants should pay for those years, except 1899, which was not a full year. In this way the result would not be different from that which has been reached in the Court below.

Defendants, however, contend that in the fall of 1896 they gave notice to plaintiff that they would no longer pay

him any royalty, regarding the patent as invalidated by transactions to which they had themselves been parties.

Plaintiff relies upon the terms of the agreement of 1892; contends that the notice was ineffectual; and that defendants are bound thereby to pay royalties during the life of the patent, and in any case that they cannot repudiate the license and yet continue to manufacture his invention without paying compensation.

There is, as I have said, no evidence that defendants renewed with plaintiff any of the terms of the agreement of 1892. A new agreement of some kind there undoubtedly was, but I cannot find that it contained any other terms than those already stated, viz., a license to manufacture, on the one side, and on the other to pay the specified royalties. That being so, both parties were at liberty to revoke or withdraw from and determine the license, and thus put an end to any agreement existing between them. Defendants might desire to do so in order to test the validity of the patent, which they were of course bound to recognize so long as they acted under the license. Their right to withdraw from the agreement, supposing that they were not disabled by the terms of it from doing so, and to refuse to act under the license, is clearly recognized by the House of Lords in *Crossley v. Dixon*, 10 H. L. Cas. 293, cited and followed by *Collins, J.*, in *Redges v. Mulliner*, 10 R. P. C. 21. While the agreement is subsisting, to adopt the language of Lord Chelmsford, defendant is not at liberty to use plaintiff's invention and to refuse to pay the royalties. "He cannot act under the agreement, and at the same time repudiate it. He may, if he pleases, put an end to the agreement, and he may use (the plaintiff's invention), but he must do so at his peril; he must do so under liability to be treated as an infringer and to be subject to an action for damages for that infringement."

That, as it appears to me, was the situation of the parties after November, 1896. To an action for damages and an injunction at the suit of plaintiff after that date it is clear that defendants could not have pleaded the license as a defence, for they had repudiated the terms upon which alone it was granted, and refused it except upon terms to which plaintiff had never assented. Plaintiff is, therefore, entitled to recover in this action only the royalty for the year 1896, which, for the reasons already given, may properly be placed at the sum of \$300, even though that year had not expired when the license was repudiated, as we see that defendants in the statement rendered by them for the previous year debit themselves with the minimum royalty at the end of

November. To such a claim the statute forms no defence, the action resting on the continued parol license or consent of plaintiff to the use of his invention, and the sum awarded being in the nature of a quantum meruit ascertained by what had been agreed upon and accepted for the previous year.

For what defendants did in the years 1897, 1898, and 1899, plaintiff's remedy is by an action for the infringement of his patent, the issues in which have not been tried in the present action.

The appeal will be allowed with costs, and the judgment below varied by reducing it to the sum of \$300, with full costs (of an action in the High Court).

SEPTEMBER 19TH, 1904.

C.A.

HOEFFLER v. IRWIN.

Partnership—Oral Contract—Purchase and Sale of Timber Limits — Interest in Land — Statute of Frauds — Part Performance—Findings of Jury.

Appeal by defendant from judgment of TEETZEL, J. (2 O. W. R. 714), in favour of plaintiff upon the findings of a jury.

Plaintiff sought for an account and payment of one-sixth of the profits arising from the sale of a certain timber limit in the township of Merritt, in pursuance of an alleged agreement between the parties by which plaintiff acquired from defendant a one-sixth interest in the said limit, in consideration of his transferring to defendant one-half of his own interest in certain contracts for driving logs and lumber on the Spanish river, in the spring of 1902. Defendant denied the alleged agreement, and further pleaded as a defence the 4th section of the Statute of Frauds.

At the trial it was proved that defendant and one William Irwin and one Thomas H. Sheppard were the joint owners of a timber limit covering the township of Merritt, under a license in the usual form, dated 13th September, 1901.

The case made for plaintiff was that he being equally interested with William Irwin in two contracts dated 29th March, 1902, for driving logs and lumber on the Spanish river in the spring of that year, defendant proposed that he should give him an interest in these contracts in exchange for which defendant would give him an interest in the Merritt limit.

The agreement was an oral one, and its terms were proved by the testimony of plaintiff alone, though there was

evidence of other persons of admissions or statements by defendant that plaintiff had an interest in Merritt, or that he would do what was right with him in respect of it.

The limit was sold by the license holders about 12th December, 1902.

The case was left to the jury generally without written questions. They found for plaintiff "that there was a verbal agreement." The learned Judge, holding that there had been a part performance of the agreement sufficient to take it out of the statute, directed judgment for plaintiff for \$2,392.85, being one-half of the sum received by defendant as his share of the proceeds of the limit after deducting what he had paid for his interest therein.

W. M. Douglas, K.C., for appellant, contended: 1st, that the subject of the agreement was an interest in land within the meaning of the statute, and that, the agreement not being evidenced by writing, plaintiff could not recover; 2nd, that there had been no such part performance as to take the case out of the statute; and 3rd, that, even if these objections failed, the verdict was so manifestly against evidence and the weight of evidence that there ought to be a new trial.

A. B. Aylesworth, K.C., and J. H. Clary, Sudbury, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.), was delivered by

OSLER, J.A. (after setting out the evidence):—It is unnecessary to examine or attempt to reconcile the numerous and not altogether consistent decisions bearing upon the question under what circumstances an ordinary contract for the sale of growing timber or trees or other things usually treated as part of the realty, to be cut or pulled down and taken away, will be regarded as a contract for the sale of an interest in land, or for the sale of goods and chattels. See, e.g., *Marshall v. Green*, 1 C. P. D. 35, which was considered and followed in *St. Catharines Milling Co. v. The Queen*, 2 Ex. C. R. 202, 229. and *Bulmer v. The Queen*, 3 Ex. C. R. 184, 217, 218, affirmed 23 S. C. R. 488, 495. See also *Lavery v. Purcell*, 39 Ch. D. 508; *Summers v. Cook*, 28 Gr. 179. The subject of the contract in the present case, namely, an interest in a timber limit, differs widely from all of those dealt with in the cases referred to, and appears to me to be clearly a contract for an interest in land within the statute, conferring as it does upon the purchaser something more than a mere interest in and right to cut and remove the trees

and timber growing upon the limit. Under the Crown Timber Act, R. S. O. 1897 ch. 32, a timber license is to describe the land, i.e., the limits, upon which the timber may be cut, and (1) shall confer for the time being upon nominee the right to take and keep exclusive possession of the land so described; (2) shall vest in the holders thereof all rights of property whatsoever in all trees, timber, and lumber cut within the limits of the license during the term thereof; and (3) shall entitle the holders thereof to institute any action against any wrongful possessor or trespasser and to prosecute all trespassers and other offenders to punishment and to recover damages, if any. . . .

[Reference to *McDonald v. McKay*, 15 Gr. 391, 18 Gr. 98; *St. Catharines Milling Co. v. The Queen*, *supra*; *Bulmer v. The Queen*, *supra*; *Breckenridge v. Wooton*, 3 Allen (N. B.) 303; *Sinnott v. Noble*, 11 S. C. R. 581, 584; *Bennett v. O'Meara*, 15 Gr. 296.]

I am unable, with all deference to my learned brother, to see that there has been any such act of part performance as to take the case out of the statute. The only thing relied upon in this respect, though it is not specially referred to in the judgment, seems to have been the division of the proceeds of the drive contracts, but this, at the most, can only be regarded as the payment of the purchase money, which, as it now appears to be settled, is not sufficient: *Maddison v. Alderson*, 8 App. Cas. 467, 479; *Fry on Spec. Perf.*, secs. 613, 614.

Plaintiff also contended that the timber limit was held as partnership property, or that defendant's interest therein was to be held as such, as between defendant and himself, and that the statute was not applicable, on the principles laid down in *Dale v. Hamilton*, 5 Hare 369; *Archibald v. McNerhanie*, 29 S. C. R. 564. Of this, however, I see no evidence. The licensees were, so far as appears, co-owners and nothing more, nor, taking it to be that there was such an agreement as plaintiff sets up, was the situation as between himself and defendant different in respect of the intent dealt with by that agreement. Even if the limit was in fact held by the three licensees as partners, it would not follow that the transfer by one of them of his own or part of his own interest would not be within the statute: *Black v. Black*, 15 Georgia.

The case of *Stuart v. Mott*, 23 S. C. R. 384, does not assist plaintiff, as the only agreement proved was for the transfer of an interest in the limit, not, as in that case, an agreement for the division of the proceeds of the property when sold.

In the result we are of opinion that the action as framed ought to be dismissed. Had the evidence of the alleged agreement been clear and satisfactory, we should probably have thought it right to allow plaintiff to amend and to recover the consideration paid on the footing of the contract. The verdict of the jury is, however, so manifestly against evidence and the weight of evidence, that, had we come to a different conclusion on the other points I have dealt with, we must have granted a new trial, and, as we ought under these circumstances now to do so at most only on payment of costs, we think the proper course is to allow the appeal and dismiss the action, with liberty to plaintiff, if he should be so advised, to bring a new action to establish the oral agreement and to recover the purchase money. Such an action, we venture to say, would be more satisfactorily tried, as the present would have been, without a jury.

The appeal is therefore allowed and the action dismissed with costs.

SEPTEMBER 19TH, 1904.

C.A.

GODERICH ELEVATOR CO. v. DOMINION
ELEVATOR CO.

Principal and Agent — Contract Made by Agent — Scope of Authority — Principal not Bound.

Appeal by plaintiffs from judgment of FERGUSON, J., 2 O. W. R. 684, after trial without a jury, dismissing the action.

Plaintiffs' claim was to recover the price of certain storage space in their elevator which they allege they reserved for defendants between 15th November, 1901, and 1st May, 1902, but which defendants did not use, and for which they refused to pay.

Plaintiffs said that the contract or agreement to take and pay for the storage space, on which they relied, was made on behalf of defendants by or through one Cavanagh, whom plaintiffs alleged to have been defendants' duly authorized agent. Defendants denied the agency and said that, if Cavanagh assumed to enter into or make the contract alleged, he did so without authority, and there was no contract binding on defendants.

The trial Judge found that Cavanagh was not a general agent of defendants, but only a special agent having no authority by implication, but only such authority as was

given to him by defendants; that he was not authorized to make the contract sued upon; that the contract was not proved; and that plaintiffs were not entitled to recover.

W. Proudfoot, K.C., for appellants.

A. B. Aylesworth, K.C., and C. A. Moss, for defendants.

The judgment of the Court (Moss, C.J.O., OSLER, MACLENNAN, MACLAREN, JJ.A.), was delivered by

Moss, C.J.O.—A perusal and consideration of the evidence, oral and documentary, shew that the conclusions of the trial Judge are well founded. Plaintiffs were the first to open communication with respect to the reservation of storage space in their elevator for the winter of 1901-2, by letter to Cavanagh. The evidence shews that at this time Cavanagh was not defendants' agent or authorized by them to deal on their behalf with respect to any such matter. He was a grain broker doing business in the city of Toronto, and as such had conducted sales of grain and arranged for terms of shipping for defendants when specially directed to do so.

It was to his interest to persuade defendants to make winter storage in Ontario as affording an opportunity of his being engaged by them in the ultimate dispositions of the grain so stored, and he wrote defendants enclosing a copy of plaintiffs' letter to him. This led to the correspondence which followed and which has been put in evidence.

Plaintiffs' chief reliance is upon a letter from defendants to Cavanagh dated 3rd September, 1901, in reply to a letter from him to them dated 30th August, 1901. In their letter defendants say they will send over 150,000 bushels to Goderich for winter storage—"You put in the application for us." And on 9th September Cavanagh wrote plaintiffs informing them that he had a letter from defendants instructing him to arrange space for 150,000 bushels wheat winter storage, and asking them to reserve this space and write him at their early convenience. But these letters and the application are to be considered with reference to the understanding of Cavanagh and defendants as to the rate to be charged and the period of time it covered, and also with regard to plaintiffs' way of dealing with applications for space. There had been an interview on the 12th August between plaintiffs' manager and Cavanagh in which rates were discussed, and as a result of which Cavanagh wrote defendants that plaintiffs had decided to charge $1\frac{1}{2}$ cents per bushel winter storage from 1st November to 1st May, on grain coming down for distribution to millers, and that meantime they would charge $\frac{1}{2}$ cent per bushel for as long a term as they had room. This

was the only intimation as to rates given by plaintiffs until they had dealt with the applications for space received from all quarters. Cavanagh's and defendants' understanding was that these were not what are called flat rates, i.e., a rate imposed once for all on grain if it enters the elevator at all, but accumulative rates, i.e., a rate proportioned to the time the grain is in storage, and increased from time to time according as the grain continues in storage until the maximum rate is reached. That plaintiffs on 12th August or 11th September, when they replied to Cavanagh's letter of 9th September, had not decided to impose a flat rate for winter storage, is apparent from the letter of plaintiffs' president to the manager, dated 19th September, where for the first time the flat rate is spoken of. But this, though apparently then decided upon by plaintiffs, was not communicated to Cavanagh or defendants at that time. And it seems plain that plaintiffs had no idea that they had made a contract with defendants on 11th September. The terms of the letter of 31st October indicate this pretty clearly. According to plaintiffs' practice applications for space are not accepted by them as entitling the applicant to what he asks for or to anything. They leave the applications open until they can consider at the same time and together all that are received—with all before them they consider the space to be allotted.

They are under no obligation to give any space or any particular quantity of space to any applicant. In 1901, with all the applications before them, they decided on 31st October to give defendants space for 150,000 bushels, but not on the terms which had been indicated on 12th August. Their letter of 31st October is their final answer to the letters of 9th and 21st September, but it proposes changed terms both as regards the rate to be charged and the period which the payment would cover. Cavanagh then understood for the first time that the rate was to be a flat rate and that it only covered from 15th November, 1901, to 1st May, 1902, instead of from 1st November to 1st May.

Not only had Cavanagh no authority to confirm this or accept for defendants the proposition then made, but he informed plaintiffs of that fact, and that he must first refer to defendants. Plaintiffs, however, assured him that they would protect him, and by that means induced him to write saying in reply to their letter that their proposition was satisfactory. Nowhere in the case is there to be found any authority from defendants to Cavanagh enabling him to bind them to the new terms by his acceptance. The letter of 3rd September falls far short of authorizing it. And as soon as defendants knew of the terms on which their application for

space was being granted by plaintiffs, they at once declined to accept them. There was no concluded bargain or agreement binding defendants to accept or pay for the space at the rates and on the terms insisted upon by plaintiffs.

The appeal should be dismissed with costs.

SEPTEMBER 19TH, 1904.

C.A.

O'HARE v. TOWNSHIP OF RICHMOND.

Municipal Corporations—Drainage—Neglect to Maintain and Repair Drain—Damages—Mandamus.

Appeal by defendants from the judgment or report of the Drainage Referee. The plaintiff took his proceedings under the Municipal Drainage Act, R. S. O. 1897 ch. 226, for a mandamus to compel defendants to maintain and repair Otter Creek drain in the township of Richmond, and for damages alleged to have been caused through the neglect and refusal of defendants to maintain and repair the drain. The Referee's report dismissed the plaintiff's claim for damages, but found plaintiff entitled to a mandamus against defendants, limited to the proper repair of the drainage work.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

E. G. Porter, Belleville, for appellants.

W. S. Herrington, K.C., for plaintiff.

OSLER, J.A.—The learned Referee has explained his views in a somewhat full and careful opinion, his conclusion being that plaintiff is not entitled to damages, but that defendants are in default for not keeping the drain in repair, and that a mandamus should go to compel them to perform their duty in this respect.

The evidence was supplemented by the Referee's personal view and inspection of the locus in quo.

After a careful examination of the evidence and further consideration of the several objections taken to the proceedings by the appellants' counsel, I remain of the opinion I formed at the conclusion of the argument, namely, that no sufficient grounds had been adduced for interfering with the judgment of the Referee, which appears to me to be entirely in accord with the merits of the case, and ought, therefore,

to be affirmed, in the absence of any valid technical objections to the procedure before him.

I think the appeal should be dismissed with costs.

MACLAREN, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., MACLENNAN and GARROW, J.J.A., concurred.

SEPTEMBER 19TH, 1904.

C.A.

MERCHANTS BANK v. GRIMSHAW.

Promissory Notes — Action against Indorser — Indorsements Procured by Fraud — Discount — Notice to Agent of Holder — Notice to Bank — Property in Notes not Passing — Conflicting Evidence.

Action to recover the amount of two promissory notes made by defendant Grimshaw and indorsed by defendants Irvine and Evans. No defence was made by defendants Grimshaw and Evans.

Defendant Irvine defended on the ground that his indorsement had been procured by fraud practised upon him by defendants Grimshaw and Evans, of which plaintiffs had notice and knowledge before they became the holders of the notes, and that they are not holders thereof in due course.

The notes were made by Grimshaw payable to Irvine, who, for Grimshaw's accommodation, indorsed them in blank. They were then handed by Grimshaw to one Robson, an agent of Evans, who delivered them to Evans, who subsequently delivered them to the plaintiffs for discount.

FALCONBRIDGE, C.J., who tried the action without a jury, found (2 O. W. R. 729) that Irvine's indorsement was procured by fraud, that Evans was not a holder in due course, and that before the property in them passed to plaintiffs they had notice and knowledge of the fraud and the infirmity of Evans' title, and he dismissed the action as against Irvine.

From this decision plaintiffs appealed.

W. R. Riddell, K.C., and G. L. Smith, for appellants.

G. F. Shepley, K.C., and W. E. Middleton, for defendant Irvine.

the notes were obtained by fraud, and requiring him to keep the notes in his possession until Irvine had an opportunity of obtaining an injunction restraining Evans from discounting or otherwise dealing with them. They testify that Simpson then told them they were too late; that the notes had been discounted; that some cheques had come in and he was obliged to put the notes through to cover the overdraft, and he also mentioned having received instructions that day to discontinue discounting for Evans. Simpson says that on being served with the notice he told them, as he had told them the previous night, that the notes were discounted, and he denies that he spoke of cheques coming in or the overdraft. Another matter to be mentioned is, that Simpson and the discount clerk testify that when the notes were sent to Brampton on 2nd October they bore on their face the letters and figures indicating that they were discounted bills and plaintiffs' property stamp, which now appear upon them. Heggie testifies that he saw and examined them in Brampton on 4th October, and that these marks and indications were not then upon them.

Dealing with this very conflicting evidence the learned Chief Justice says: "I accept the evidence of Mr. Heggie as to what took place on the nights of the 2nd and 3rd October, basing my preference for his account of the conversations both on the demeanour of the witnesses and the cogency of the circumstances. I accept his statement also as to the plight and condition of the notes on the 4th day of October, when he saw them in Brampton."

In view of the evidence and these findings, and having regard to the burden of proof, the conclusion must be that plaintiffs have failed to shew that as holders in due course they had given value in good faith for the notes without notice of the defect in Evans's title to them. . . .

The appeal should be dismissed.

SEPTEMBER 19TH, 1904.

C.A.

DEYO v. KINGSTON AND PEMBROKE R. W. CO.

Railway—Trains Passing under Bridge—Railway Act, 1888, sec. 192 — Statutory Obligation as to Height of Cars — Violation — Death of Brakesman — Liability of Railway Company — Ownership of Bridge — Omission to Stop Train before Crossing another Railway—Proximate Cause of Death—Disobedience of Rules of Company—Prohibition against Standing on Top of Cars.

Appeal by defendants from judgment of BRITTON, J., in favour of plaintiffs, upon the findings of the jury, in an

action under the Fatal Accidents Act, brought by the widow and daughter of Frederick Deyo, a brakeman in the employment of defendants, to recover damages for his death, caused as alleged by defendants' negligence. The neglect or breach of duty alleged was the omission to comply with the requirements of sec. 192 of the Dominion Railway Act, 1888, and, contrary to the provisions of that section, using higher freight cars on their railway than such as admitted of an open and clear headway of at least 7 feet between the top of the car and the lowest beam of a bridge under which the railway passed, by reason of which the deceased, who was employed on a train of defendants, came into collision with the bridge and was killed. A further cause of action put forward at the trial was defendants' neglect to comply with the obligation imposed on them by sec. 258 of the Act, viz., to stop their train for at least one minute before crossing the track of the Grand Trunk Railway Company at rail level under the bridge.

I. F. Hellmuth, K.C., and W. F. Nickle, Kingston, for defendants, appellants, contended that the bridge over their line had been constructed many years before the passing of the Act, and before defendants ran their trains under it at all; that the Grand Trunk Railway Company, and not the defendants, were the owners of the bridge; that in these circumstances they were at liberty to use freight cars of any height they pleased which could go under it, and were under no obligation to raise the bridge, and had no authority to interfere with it; that in any case the proximate cause of the accident was the deceased's own non-compliance with and non-observance of the company's rules of service, to which he was bound to conform.

D. M. McIntyre, Kingston, for plaintiffs, contra.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.), was delivered by

OSLER, J.A. (after setting out the evidence).—Upon the proper construction of sec. 192 of the Railway Act, I am of opinion that defendants, whether owners of the bridge or not, were guilty of a violation of the obligation imposed upon them by sub-sec. 2 of the section, for which, by force of sec. 289, an action lies at the instance of any person injured thereby, subject of course to any grounds of defence which may be open to them.

The language of the section is open to criticism, but the Legislature has sufficiently expressed its intention that a rail-

way company shall not use higher freight cars than such as admit of an open and clear headway of seven feet between the top of such cars and the bottom of the lower beams of any bridge which is over the railway.

The question is not of the ownership of the bridge, but of the user of the cars. "Company" means any company or person operating a railway under a bridge, and is not confined to the company which has built it or is the owner of the bridge.

The section does not contemplate, in reference either to bridges in existence when a company begins to operate its line, or bridges afterwards constructed, a user of cars which do not admit of the prescribed headway, except where that is permitted by the Governor-General in council, in the case provided for by sub-sec. 5.

Taking the section as a whole, the following appears to me to be its proper exposition. Sub-sections 1 and 2: Every bridge shall be so maintained as to admit of an open and clear headway of at least 7 feet between the top of the highest freight car used on the railway and the bottom of the lower frame of the bridge over the railway. To an existing bridge, whether owned by the railway company or any one else, the company must accommodate the height of their cars so as to ensure that headway. Before they use higher cars than such as will admit of that headway, they must raise the bridge. If they are the owners of the bridge they can, of course, do so without any one's consent, but if they are not the owners, and cannot procure the consent of the owners, they must be content to leave things as they are, and to use freight cars which will leave the prescribed headway, though they may be not so high as they would wish to use.

Sub-section 3 deals with the construction of a new bridge and the reconstruction and repair of old ones. For the first it must be constructed so as to leave the prescribed headway with reference to the cars *then* used on the railway, and for the latter, the cars *then* in use have, by the hypothesis, i.e., of the application of sub-sec. 2, been such only as admitted of such headway, and the bridge must be reconstructed or repaired in reference to them, and so that it shall not be lower than it was before.

And lastly, sub-sec. 4 deals with the company's right to use higher cars than those in use at the time of construction, reconstruction, or repair of the bridge. If they desire to change the existing state of things, they must get the consent of the municipality or bridge owner, and raise the bridge so as

to admit of the prescribed headway over the top of the highest freight cars *to be used* on the railway.

It is possible that in using the word "maintained" in sub-sec. 5 of sec. 192, the Legislature assumed that railway companies had complied with the obligation of sec. 15 (5) of the Consolidated Railway Act, 1879, and its amendment, 44 Vict. ch. 24, sec. 5 (D.) and had altered and reconstructed additional bridges which had not admitted of the 7 clear feet headway over the style of car in use before this legislation. Mr. Hellmuth referred to *McLaughlin v. Grand Trunk R. W. Co.*, 12 O. R. 418, and *Gibson v. Midland R. W. Co.*, 2 O. R. 658, as deciding that defendants, not being the owners of the bridge, were not under any obligation to raise it, and were therefore not liable for damages resulting from the user of the higher car. In both of these cases, however, the question was upon whom the absolute obligation to raise or reconstruct the bridge was cast, in the one by the Dominion Act of 1881 and in the other by the Ontario Act of the same year, 44 Vict. ch. 22. It was held to rest, though plaintiffs failed upon other grounds, upon that company which was the owner of the bridge. In neither case was there any question upon the clause which corresponds with sub-sec. 2 of sec. 192 of the Act of 1888—a section which is framed so differently from the former provisions on the subject that these do not throw much light upon its construction. *Atcheson v. Grand Trunk R. W. Co.*, 1 O. L. R. 168 (C.A.), which in principle, I think, supports the view I take of the meaning of sec. 192, may be referred to.

The other ground of negligence relied on, viz., the omission to stop before crossing the track of the Grand Trunk Railway, as required by sec. 258, even if the fact was sufficiently proved, affords, in my opinion, no cause of action. The object of the section is to prevent collisions at crossings, and non constat, if defendants' train had been stopped, that the deceased would have left the car or would not have met with the accident.

There remains the question whether the violation of the statutory duty of defendants under the other section was the proximate cause of the death of the deceased, or whether this must not be said to have been wholly owing to his own unfortunate neglect of the rules of the company. I feel compelled to say that on this ground the defence has been made out, and that the action must fail. Even to an action founded on the breach of a statutory duty, contributory negligence may be a defence, as we constantly see in actions

arising under the Workmen's Compensation Act or the Factories Act: *Groves v. Wimborne*, [1898] 2 Q. B. 402, 419. A fortiori, it must be an answer to such an action that the injury was caused by the deceased's own act or omission, that it was caused by or could not have happened but for the servant's direct disobedience of some order or rule of his employers, intended though that may have been to prevent accidents arising from the continued failure of the latter to perform their statutory duty: *Holden v. Grand Trunk R. W. Co.*, 5 O. L. R. 301; *Anderson v. Mikado Gold Mining Co.*, 3 O. L. R. 581; *Fawcett v. Canadian Pacific R. W. Co.*, 32 S. C. R. 721.

The prohibition contained in defendants' rule Q. against employees standing on the top of box cars passing under the bridge in question is distinct and unequivocal. Rule 32 is slightly wider in its terms, forbidding brakemen and others to ride on the top of such cars, and the deceased either should not have been there at all or should not have been standing there. That he knew of rule Q. cannot be controverted. These rules were made to be observed by employees at the particular place specified in them, a place known to the deceased, the danger incident to which he had also been warned of. There is no ground for saying that these rules are inconsistent with other rules, as, if he was forbidden to be or to stand on the box cars at the place in question, no others required him to be there in order to apply the brakes. Nor is there evidence that any emergency had arisen or was likely to arise which might be thought to excuse a breach of these rules, as the train was properly proceeding at a rate of speed which enabled it to be sufficiently controlled by the engine brakes or by the brakes on the flat cars, which the deceased could have used. It was suggested that he was properly on the top of the car for the purpose of connecting the bell-cord with the engine, but the evidence does not bear this out; nor indeed does it appear that the cord had not in fact been connected before the train started, as the duty of the deceased required that it should be. There was, in short, no evidence of anything which could have justified the deceased in being on the box car at the time and place in question in contravention of the rules of the company. He met with his death in consequence of being there, and I think it follows that the appeal must be allowed and the action dismissed.

SEPTEMBER 19TH, 1904.

C.A.

KNY-SCHEERER CO. v. CHANDLER AND MASSEY.

Sale of Goods—Action for Price—Ascertainment—Counter-claim for Breach of Contract — Representations not Amounting to Contract.

Appeal by defendants from judgment of MEREDITH, C.J., 2 O. W. R. 215, in favour of plaintiffs.

By their statement of claim plaintiffs set up several distinct causes of action, but at the trial the only ones pressed came under the head of goods sold or furnished to or received by defendants.

Defendants, besides denying plaintiffs' causes of action and alleging payment and satisfaction of all claims, counter-claimed for damages in respect of breaches of an alleged agreement by plaintiffs to establish and maintain in Canada a wholesale and export department of their business with a well assorted stock of the value of at least \$50,000. By an amendment allowed to be made at the trial defendants also counterclaimed for damages for default by plaintiffs in supplying defendants with certain price lists or catalogues.

At the trial plaintiffs' prima facie case in respect of goods sold or supplied and received was admitted, subject to reduction or extinction in the event of defendants shewing that the prices charged were not the prices which they were liable to pay for the goods, and defendants entered upon their case against plaintiffs. The counterclaim was first dealt with, and subsequently the question of reduction of prices.

The trial Judge held against defendants on both branches, and gave judgment for plaintiffs for \$7,122.02 with costs of the action, and dismissed the counterclaim with costs.

E. B. Ryckman and C. W. Kerr, for defendants, appellants.

G. F. Shepley, K.C., and W. E. Middleton, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

MOSS, C.J.O.—In dealing with the counterclaim . . . it was made a question whether it amounted to an allegation of an agreement by plaintiffs or whether it was to be deemed an allegation of representations made with the purpose of influencing defendants' conduct or inducing them

to enter into the agreement of 31st January, 1900. But it does not appear to be very material to ascertain in which view the pleader intended to present the case. In either view the proof to support the pleading must amount to proof of a promise. In the present state of the law the argument that the Courts will compel a person to make good a representation not amounting to a contract cannot be supported. . . . [In re Fickens, [1900] 1 Ch. at p. 334, referred to.]

Defendants have not counterclaimed for rescission or specific performance. Their claim is for damages, and in order to recover they must shew a contract and a breach. Have they proved that plaintiffs promised and agreed to establish and maintain in Canada a wholesale and export department of the character alleged? . . .

The testimony does not go the length of shewing an agreement binding plaintiffs to the establishment of the department if defendants agreed to buy their lines of surgical instruments from them. It is a circumstance of no small weight against defendants—though of course not conclusive—that every other term of the agreement between them and plaintiffs was carefully reduced to writing, and there is no satisfactory explanation of the omission of this most important part from the formal document. . . . There was nothing respecting it to put into writing because there was no agreement. . . . On the whole there is no good ground for disturbing the Chief Justice's conclusion on this branch of the case. . . .

The remaining questions are governed by the writings between the parties.

The first is the other item of the counterclaim, i.e., the failure to supply catalogues according to the terms of the agreement of 31st January, 1900. . . . It appears that plaintiffs were proposing to prepare and publish a price list or catalogue for the use of their retail customers, and by the terms of the agreement that in form it was to be similar to a sample copy submitted, with an addition of orthopedic catalogue and sundry accessories. Defendants were to be entitled to not less than 3,000 copies, paying therefor not less than half the actual cost thereof, those provided to have defendants' name printed on the cover and title page, instead of plaintiffs', but retaining plaintiffs' trade mark. . . . It does not appear that there was any improper delay, but the volume was not ready until November, 1901, by which time plaintiffs and defendants were at arms' length over the terms of the arrangements between them. Defendants did

not complain of the delay, but when they received plaintiffs' circular announcing their readiness to prepare and send them copies for their use, defendants wrote treating the contract as at an end but expressing their willingness to take the catalogues at \$195 a thousand. They, however, gave no definite order and made no tender of the money or of the freight. Plaintiffs were not bound to deliver them in Canada, and defendants never followed up their letter. The claim under this head fails, and the judgment dismissing it must stand.

There remains the question of the prices to be charged to defendants for the goods supplied to them, and of those taken over by them, as stated in their letter of 30th October, 1901.

The words of the contract which seem to govern the sales to defendants are found in the 7th paragraph of the agreement. Plaintiffs are to supply defendants their products at the lowest wholesale prices. There is nothing uncertain or ambiguous in the phrase "lowest wholesale prices." It means in this contract the lowest price at which manufacturers and dealers in the same class as plaintiffs are selling goods by wholesale to customers who purchased from them in ordinary course for the purpose of retailing to consumers or users. Obviously it would not extend to goods supplied to branches of the same business, but would include all independent dealers. Such being the general right of defendants, the method of ascertainment of prices is found by reference to the confidential wholesale catalogues as regards goods furnished from New York, and to the provision for fixing new prices as regards goods furnished from Montreal or by direct shipment from Europe.

The course of dealing adopted by the parties worked out these provisions in a practical way. Prices in the confidential catalogue were taken as the basis, but from time to time alterations were made by both parties as the prices varied. Invoices and statements were received by defendants and entered in plaintiffs' account at the prices mentioned. Occasionally there were objections on one side or the other, but the correspondence shews no serious complaint as to prices in general. . . .

In view of these dealings, extending over a period of 20 months, it is too late to ask us to enter upon an inquiry involving the revision of the prices thus fixed and acted upon by both parties.

The appeal fails and should be dismissed.

SEPTEMBER 19TH, 1904.

C.A.

OTTAWA ELECTRIC CO. v. CITY OF OTTAWA.

*Contract—Breach—Damages—Allowances and Deductions—
Accounts—Interest.*

Appeal by defendants from order of STREET, J., dismissing an appeal from the report of the Master at Ottawa upon the taking of the accounts pursuant to the judgment of the Court of Appeal (2 O. W. R. 596) affirming the judgment of BOYD, C. (1 O. W. R. 508) as to the proper interpretation of certain clauses in the contract for the street lighting of the city of Ottawa, difficulties having arisen after the great fire of April, 1900, by reason of plaintiffs' works having been destroyed.

C. Millar and T. McVeity, Ottawa, for appellants, contended that the Master had erred to the disadvantage of defendants in his mode of calculating the allowances and deductions to be made from plaintiffs' original claim; and that he had erroneously allowed interest.

G. F. Henderson, Ottawa, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

GARROW, J.A.—As stated in the judgment of this Court when the case was before us on a former occasion, plaintiffs' cause of action is based upon the contract itself, and not upon a quantum meruit.

Plaintiffs agreed to light by means of electricity the streets of the city of Ottawa for the term of ten years, and to supply for such purpose 331 lamps of not less than 2,000 candle power, and such additional lamps as the city might require, for which payment was to be made at the rate of \$65 per annum for each lamp. Express provision was made in the agreement for the case of what might be called a negligent default on the part of plaintiffs, in which case a deduction of 50 cents per lamp per night as liquidated damages was agreed upon, but no express provision was made for the not improbable event of a temporary failure from unforeseen or accidental causes not attributable to negligence. Such an event actually occurred in the destruction

of plaintiffs' plant, together with a large section of the city, in the serious conflagration of 26th April, 1900.

Plaintiffs' covenant to supply and keep the lamps lit was absolute and unconditional, and the breach of such covenant caused by their inability to supply the stipulated light for a time after the fire is admitted.

Both parties, however, treated the contract as still subsisting, and plaintiffs proceeded with due despatch to restore the destroyed plant, and within 4 days were supplying some light, the quantity gradually increasing until the normal was reached about the following October.

Under the circumstances it is clear that performance by plaintiffs according to the letter of the agreement was not a condition precedent. The covenant, which I have called the penal clause, alone would so indicate. And the proper construction of the agreement, therefore, clearly required and requires that plaintiffs' covenant to perform should be treated simply as an independent covenant, the breach of which by the temporary failure caused by the fire gave to defendants a cause of action for such damages as naturally followed from the breach.

The question, therefore, was really one of the proper measure of damages, the defendants contending that the penal clause allowing a deduction of 50 cents a lamp per night was applicable, while plaintiffs contended that that clause was inapplicable under the circumstances. Plaintiffs' contention was approved by the learned Chancellor, and his judgment was affirmed by this Court, and the measure of damages in the case of breaches caused by accident such as the fire was fixed at payment, at the contract rate, for the light actually supplied, leaving the penal clause in full force as to failures and omissions within plaintiffs' control, and with these declarations the matter of the accounts was referred back to the Master.

He has now with care and intelligence wrought into final results the direction of the Court, and has, in my opinion, reached proper conclusions.

Such being my opinion, it is perhaps unnecessary to examine minutely in the light of defendants' criticism the several details of the learned Master's findings, and yet a word or two as to some of them may not be out of place.

It is said he should not have allowed for lights which were only lit for part of a night, and that deduction should

have been made for lights which were out for periods of two hours or under. But for both allowances the learned Master had at least the warrant of Mr. MacDonald, the defendants' own superintendent of fire alarm, who was in charge of the city lighting before he was interfered with by the city council and its officials, and while free to exercise his own judgment. . . .

Then it is said it was erroneous to calculate the value of the omitted service by what are called lamp hours, instead of, as I understand it, nights, or equal 1-365ths of the year, but, bearing in mind that the question is one of damages, it is obvious that the learned Master's method is the fair one, inasmuch as it regards, in estimating the damages, the short nights of summer, the period in question, as properly favourable to plaintiffs, who had still to perform the contract, and no doubt did so, during the longer nights of the succeeding winter. The service was not a nightly any more than an hourly service, but was a yearly service, including the long nights of winter as well as the short ones of summer, at \$65 per lamp per year.

With reference to the important item of interest I have had, I confess, more doubt.

But upon the whole, the finding can, I think, be supported. The facts are not unlike those in the case of *McIntosh v. Great Western R. W. Co.*, 4 Giff. 683-689, approved of by Lord Watson in the House of Lords in London, *Chat-ham, and Dover R. W. Co. v. South Eastern R. W. Co.*, [1893] A. C. at p. 442.

See also per Osler, J.A., in *McCullough v. Clemow*, 26 O. R. 467, at p. 477.

There can now, I think, be little doubt upon the whole evidence that Mr. MacDonald was improperly interfered with by defendants, and that, if left to himself and to the exercise of his own judgment, as he should have been, he would have so certified as to have made plaintiffs' claim clearly a liquidated and interest-bearing claim, and under the circumstances defendants should take no advantage by their improper interference.

The appeal should, I think, be dismissed with costs.

SEPTEMBER 19TH, 1904.

C.A.

MCGILLIVRAY v. TOWNSHIP OF LOCHIEL.

*Municipal Corporations — Drainage — Action—Damages—
Injunction — Reference to Drainage Referee — Powers of
Local Judge — Overflow on Plaintiff's Lands — Outlet —
Riparian Proprietors — Drainage into Natural Water-
course—Award of Township Engineer—Damages—Causes
of Action—Joinder of Defendants—Costs.*

Appeal by defendants from judgment of Drainage Referee in favour of plaintiff, upon a reference to him of the matters in dispute between the parties. The writ was issued in the High Court of Justice against some 70 defendants, including the corporation of the township of Lochiel.

The statement of claim set forth that plaintiff was the owner of certain lands in the township of Lochiel, and that defendants, other than the corporation of the township, were the owners of certain other lands in the township, from which they had, by means of certain drains, some of which had been made under the provisions of the Ditches and Watercourses Act, and defendants the corporation of the township had by certain ditches along the highway, unlawfully caused surface water to flow upon plaintiff's lands, and he claimed damages and an injunction.

Defendants pleaded separately denying the joint cause of action, denying also the injury, alleging that if injured it was from natural causes and not from acts of theirs, and setting up the engineers' awards in the cases of the defendants who were parties to such awards, as an answer, and other defences upon which nothing turned.

The action was referred to the Drainage Referee under an order made by a local Judge in Chambers dated 17th September, 1901, and the Referee made his report on 29th April, 1903, whereby he found that no evidence had been advanced against defendants the individual owners who had constructed ditches on their own lands for the purposes of draining their own farms, and he dismissed the action as against these defendants with costs to them, which he fixed at \$100; (2) that the defendants who were parties to award drain No. 4, which had not been constructed, but was abandoned, were also entitled to be dismissed from the action, and he fixed their costs at \$50; (3) that the other award

drains did cause water to overflow plaintiff's lands injuriously, and that the defendants parties to such award drains, namely 1, 2, 3, and 5, were responsible for the damages caused thereby, because such drains had not been carried to a sufficient outlet, and he assessed as one sum against all these defendants the sum of \$500, which he ordered them to pay as such damages, and he awarded an injunction restraining these last named defendants as claimed by plaintiff, restraining the use of these award drains, unless these defendants should within nine months provide a sufficient outlet for the waters sent down by the said award drains; and he allowed to plaintiff his costs.

All the defendants except Alexander Cameron appealed; the defendants who were dismissed from the action on the question of costs, and the others generally.

M. Wilson, K.C., E. H. Tiffany, Alexandria, and F. T. Costello, Alexandria, for appellants.

J. Leitch, K.C., for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

GARROW, J.A.—An objection was urged before us that there was no power, unless by consent, to refer the action to the Drainage Referee, but this objection cannot now be given effect to. The order does not upon its face express that it was made by consent, and must therefore be assumed to have been made by the local Judge in the exercise of his judicial discretion. And if such discretion was improperly exercised defendants should have appealed against the order.

Spring creek is a natural watercourse rising in the neighbourhood of the boundary line between the townships of Kenyon and Lochiel, flowing easterly for a distance of several miles until it reaches the lands of plaintiff, where it turns northerly, and, after a further course of about two miles, empties into the DeGrasse river. Upon the lands of plaintiff the banks of the stream are low and the current very slight, but up stream from him there are well defined banks and a considerable fall. There are obstructions in the channel on plaintiff's lands, and also on the next lot below him, which impede the flow, but, if these obstructions were removed down to what are called the "falls," ample outlet could be obtained, to the great advantage apparently not only of plaintiff but of all the others who use Spring creek as the outlet for their surface drainage.

As it is, plaintiff's lands are severely flooded in time of freshet, and probably would be to some extent flooded even with the best outlets because of their low situation and of the shallow banks of the channel there.

To the extent that the injury to his land proceeds from natural causes he has of course no cause of complaint.

Nor is it a proper subject of complaint by him that the individual riparian properties above him have made what appears to be only a reasonable use of the stream as it flows past their lands as an outlet for their drains constructed on their own lands to drain them for agricultural purposes. . . .

[Reference to *Miller v. Laubach*, 47 Penn. St. R. 154; *Re Township of Elma and Township of Wallace*, 2 O. W. R. 118; *McCormick v. Horan*, 81 N. Y. 86; *Gould on Waters*, 3rd ed., sec. 274; *Young v. Tucker*, 26 A. R. 162.]

But this right of individual riparian proprietors to drain directly through their lands into the stream is not at all the same thing as the right, if any, which accrues to two or more persons not riparian proprietors seeking drainage outlet under the provisions of the Ditches and Watercourses Act. Such latter right is purely statutory, and has in no way interfered with or curtailed the common law right of a riparian proprietor to have the stream flow through his land in its accustomed volume without sensible diminution or increase, except, as before pointed out, by the drainage into the stream directly from the lands of the upper riparian proprietors. No one not a riparian proprietor has such a right, nor can the upper riparian proprietor himself confer such a right upon one whose lands do not touch the stream, to the prejudice of a riparian proprietor down stream. The right of persons not in the position of riparian proprietors, and who proceed for relief under the Ditches and Watercourses Act, is to have the ditch or drain carried to a proper outlet, and a proper outlet is one which, as defined in the statute, enables the water to be discharged without injuriously affecting the lands of another. The lands of a riparian proprietor below the outlet are under no such servitude in respect of the waters thus cast into the stream as they are subject to in respect of the reasonable use of the stream for drainage purposes by the upper riparian proprietors. If his lands are overflowed by waters coming from the drain, the outlet is not a proper one, and he is not compelled to submit to it.

Of course a running stream with sufficient banks to contain the water would usually be a sufficient outlet. But the

question is one of fact. For instance, a stream already fully occupied in carrying the water properly belonging to it would not be a proper outlet for foreign water brought to it by a ditch constructed under the Act, if the inevitable result would be to cause the water to overflow upon the lands of the owners down stream. And that appears to be the situation in the present case. Plaintiff asserts, and the Referee has found upon apparently sufficient evidence, that the effect of these award drains, as they are called, and particularly of numbers 1 and 2, is to increase the overflow upon plaintiff's lands, and he therefore reached the conclusion that the outlets were insufficient.

I agree with his conclusions as to these award drains 1 and 2. These carry a considerable body of foreign water into the stream immediately above plaintiff's lands, where the stream has already lost its current and has almost become a lagoon, and must very considerably increase the flooding of plaintiff's lands.

But I am unable to agree that the same result should follow in the case of drain number 3, which is a very small affair, too small to sensibly affect the stream, and moreover is apparently entitled to stand upon the footing of a drain by a riparian proprietor directly into the stream, nor in the case of drain No. 5, which apparently begins and ends in a branch of the stream some miles above plaintiff's lands, and which does not therefore bring into it foreign water. There is nothing to prevent a riparian proprietor from straightening, cleaning out, deepening, or widening the stream itself as it passes through his own land, provided he discharges it as it leaves his land in its usual channel, which is all that was apparently done in the case of drain No. 5. And what one riparian proprietor may do, several in combination may do with or without an award.

And this brings me to the important question so much urged upon us by counsel for defendants, that, whether the outlets are or are not sufficient, they are the outlets provided in his awards by the township engineer, and are binding upon plaintiff, although no party to them, as well as upon the defendants who were parties. This point has apparently not been before passed upon in any reported case where the question was as between the rights of a third party in conflict with those claimed by the parties to the award, although in *In re McLellan and Chinguacousy*, 27 A. R. 355, the effect of an award as between the parties themselves was

considered, and was held to limit these rights to those obtainable by a reconsideration of the award under the provisions of the statute.

But, in my opinion, a third party, that is, a person not a party or privy to the award, cannot be affected by it. It would I think, be contrary to every settled principle if he could. He receives no notice of the proceedings. He may be non-resident, and yet it is said his property may be, behind his back, injuriously affected, and, in fact, confiscated, without remedy, except such, if any, as he may be able to obtain under the Act. Nothing in the Act requires such an extraordinary effect to be given to the award.

The statute in force when these drains were constructed was R. S. O. 1887 ch. 220.

The engineer is an officer of the corporation: sec. 2. But he need not be a qualified engineer, as any one may be appointed. He has no power to initiate proceedings under the Act. The persons who may set him in motion are those mentioned in sec. 4, namely, the owners of lands, whether immediately adjoining or not, which would be benefited by making a ditch or drain, etc., to enable the owners or occupiers thereof the better to cultivate or use the same, and such owners are thereby charged with the duty to open, make, and maintain a just proportion of such ditch or drain according to their several interests in the same, and it is only in case of dispute among themselves that the engineer is to be called in: sec. 5. If there is no dispute, the owners interested may do all that the engineer has power to direct. His interference confers no extended jurisdiction, but is really confined to adjusting the disputed points which arise in the performance of the statutory duty imposed upon the owners by sec. 4. There is nothing to prevent all parties interested agreeing to call in some other engineer to settle their differences, instead of the township engineer. Such other person would not, of course, possess the statutory powers of the township engineer, but a ditch constructed in that way would, when completed, be a ditch under sec. 4 exactly in the same way and to the same extent as if it had been made under an award of the township engineer. The award itself in fact confers no authority and imposes no duty except in the mere matter of the details of performing the statutory duty already prescribed and imposed upon all owners by sec. 4.

The statute requires the water to be taken to a sufficient outlet so that no person's land shall be flooded or overflowed. The duty to provide such an outlet is the same whether the engineer is called in or not. He has no power to finally determine what is or what is not a proper outlet, not even as against a resisting party to his proceedings, who could certainly before the work proceeds bring that question into Court for adjudicating notwithstanding the award. The question of proper outlet is really in the nature of a condition precedent to the authority of the engineer in the premises. If it does not exist, the proposed drain can not be made, and he has no jurisdiction, and an injunction might be obtained to restrain all proceedings under the award.

Of course it is important for these parties to obtain good and sufficient drainage, and the law has, I think, made provisions which, if adopted, would have secured that end, and have obviated the present situation. The Ditches and Watercourses Act was not intended for such a case as the present, but for the simpler case of a comparatively short and inexpensive ditch to reach an undoubted outlet. The proper remedy in the present case would, I think, be found in the provisions of the Municipal Act under which the whole stream could be so deepened and enlarged as to afford ample drainage facilities for all the neighbouring lands, including those of plaintiff, at an expense which, while no doubt considerable, would still be far below its great advantage to all concerned. And to that remedy plaintiff, we were informed, has repeatedly invited defendants, but so far without success. That being so, I have the less compunction in supporting the Referee's conclusion that the defendants who were parties to drains 1 and 2 must be restrained from continuing to use the award ditches in question.

As to the damages. The Referee has treated the wrong complained of as a joint tort, and has awarded a lump sum of \$500 against all the defendants. But the cause of action was not, in my opinion, joint, but several, and each party is liable not for what his neighbour did, but for what he did himself. In fact, strictly speaking, there was no right to join the defendants at all in one action for damages: *Hinds v. Town of Barrie*, 6 O. L. R. 656, 2 O. W. R. 995: although such a joinder may be permissible where an injunction only is sought to restrain a nuisance contributed to by all the defendants.

And even in an action for damages the parties to each of the awards might have been joined in one action, because their acts in creating the ditch was joint. But it is obvious

that there is no joint connection between the several sets of defendants as among themselves, and they should not have been jointly sued if damages only were sought.

To make a separate assessment of damages would be, in the circumstances, extremely difficult, if not impossible. There is no evidence to shew to what extent each defendant or set of defendants has contributed to the total injury. If plaintiff could do so, he should have supplied the evidence. Without it his case for damages is not complete, with the result that he is only entitled to nominal damages, and that, I think, with the injunction, is what he should have.

With reference to the question of the costs of the defendants who were dismissed from the action by the judgment of the Referee, no reason is suggested why these defendants should not be paid their proper taxable costs instead of the lump sums allowed, except that it was considered that they should have joined in one defence. But they were not obliged to do so if separate defences were necessary, and that is, I think, a matter to be considered by the taxing officer, who will not, of course, allow the costs of unnecessary proceedings. The judgment should therefore be amended in this respect, simply dismissing the action as against them with costs. And they must have their costs of this appeal.

And the same result as to costs must follow in the case of the defendants who were held liable by the Referee as parties to the 3rd and 5th award drains. The action should be dismissed with costs as against them, and they must have their costs of the appeal.

Plaintiff should have the costs of the action against the defendants who are parties to the 1st and 2nd awards, as if they had alone been sued, and as against these defendants there should, I think, be a similar order as to the costs of this appeal.

MAGEE, J.

SEPTEMBER 20TH, 1904.

CHAMBERS.

RE ESTATES LIMITED.

Company—Winding-up—Several Petitions—Conduct of Proceedings—Costs.

Petitions by Archibald McMillan and May Manderson for winding-up orders under the Dominion statute.

C. Elliott, for petitioner McMillan.

S. B. Woods, for petitioner Manderson.

S. King, for the company.

MAGEE, J.—There are two petitions for a winding-up order. All parties consent to an order being made, and the case is a proper one. Both petitions come on together, but the one first filed is by Mr. McMillan, who alleges that the company are indebted to him for services rendered, but gives no other particulars either in his petition or affidavit. No objection was made on that score, but I do not desire to be considered as approving of such a statement of indebtedness as being all that is required by the Act. The second petition was filed on the day after Mr. McMillan's by Mrs. Manderson, who alleges that she is a creditor under a contract which is put in, and under which she made payments to the company.

The question is between the petitioners, as to which of the petitions shall be allowed, and who shall have the conduct of the proceedings.

It appears that there are some 250 such contracts as that with Mrs. Manderson outstanding with other persons. On perusal of the contract, which is on a printed form, one can only wonder how persons could be so simple as to be induced to enter into it. Manifestly none of those who did could have had any professional or independent advice or any business experience. . . .

It appears that the petitioner Mr. McMillan was an agent of the company, employed in selling stock of the company, and in close touch with the officers and management of the company and friendly to them, and on behalf of Mrs. Manderson the belief is expressed that he will not act in hostility to them nor take the same interest in the prosecution of the winding-up as would she, who has relations and friends in the same position as herself.

The fear is, I think, a reasonable one; although it is fair to say that Mr. McMillan disclaims collusion; and, as the affairs of the company and its methods should be probed to the bottom, and the creditors should not have any reason for misgivings in that regard, the prosecution of the winding-up should be in other hands. . . .

In ordinary circumstances the first petition has the preference, and a second petition would be unnecessary, and the second petitioner would lose her costs if she had notice of the previous one, unless there were other reasons for filing a second, such, for instance, as fear of collusion.

Under the circumstances, the order for winding-up will go under both petitions, but Mrs. Manderson will have the

conduct of the winding-up proceedings. The costs of both petitions and of the company therein to be paid out of the estate. See *In re Constantinople and Alexandria Hotel Co.*, 13 W. R. 851. All parties consenting, Mr. Clarkson, the present assignee, will be the interim liquidator. Usual reference to J. A. McAndrew.

SEPTEMBER 20TH, 1904.

DIVISIONAL COURT.

SCOTT v. BUCK.

Mortgage—Redemption—Default on Final Day Fixed—Refusal of Defendant to Accept Redemption Money—Application to Court to Open up Order—Exceptional Indulgence—Relief from Forfeiture—Terms—Costs.

Appeal by defendant from order of BOYD, C., 3 O. W. R. 629.

H. M. Mowat, K.C., and G. A. Sayer, Chatham, for defendant.

W. H. Blake, K.C., for plaintiffs.

THE COURT (MEREDITH, C.J., IDINGTON, J., MAGEE, J.), dismissed the appeal without costs.

CARTWRIGHT, MASTER.

SEPTEMBER 21ST, 1904.

CHAMBERS.

MOFFAT v. LEONARD.

Discovery—Examination of Person for Whose Benefit Action Defended—Rule 440—Affidavit on Production.

Motion by plaintiff under Rule 440 to examine for discovery A. B. Cowan and William Cowan as persons for whose immediate benefit this action was defended, and for a better affidavit on production.

G. H. Kilmer, for plaintiff.

C. A. Moss, for defendants.

THE MASTER.—The grounds on which the motion is based are the answers given by C. W. Leonard, a member of the defendant firm, on his examination for discovery on 12th September instant. The action is for alleged infringement by defendants of certain inventions which plaintiff has patented . . . infringement by the manufacturer of the "Dakin Heater." The statement of defence denies all allegations in statement of claim. It also says that the right to manufacture the "Dakin Heater" was acquired from Cowan & Co. In the examination for discovery C. W. Leonard sets this all out and mentions having received a letter from Cowan of 19th September, 1902, and also one from plaintiff and certain agreements and transfers from the Cowans to defendants made in 1897 and 1902. The plaintiff is entitled to have these produced, and so a better affidavit on production should be made.

As to the other branch of the motion, I do not think it should succeed. No case is to be found where a motion such as the present has been made. . . . All the cases on the Rule have been on application of defendants to examine the real plaintiff. This has always been the case from the first one, *Macdonald v. Norwich Union Ins. Co.*, 10 P. R. 462.

Without having the documents before me, it is impossible to say positively that the Cowans do not come within the Rule and, if plaintiff so desires, the motion may be renewed on these documents being produced.

But in the present state of the case the motion cannot succeed. There is no evidence that the action is being defended for "the immediate benefit" of the Cowans. At the most a successful defence may relieve them from a possible liability to defendants. But the main benefit will be to defendants themselves, who will then be able to go on with what would appear to be a profitable industry.

In order to invoke with success this Rule 440 the facts should answer the tests proposed by Street, J., in the analogous case of *Major v. Mackenzie*, 17 P. R. 18 . . .

I gather from the depositions of Mr. Leonard that there was nothing done by the Cowans in any way after this action was brought, nor before it, in reference thereto. . . . It seems to me that the same principle that has been applied to defendants' applications must be applied to this now made by plaintiff. If the note of the case of *Menzies v. Toronto*

and Ottawa Co., Holmested & Langton, p. 616, is correct, then this motion cannot succeed, and must be dismissed.

As the point is new, and there are no authorities to guide, the costs will be in the cause.

Wallbridge v. Trust and Loan Co., 13 P. R. 67, indicates what would appear to be the principle of decision here: that defendants are vitally interested and are not defending for the immediate benefit of the Cowans, though the latter may have an indirect interest in defendants' success.

CARTWRIGHT, MASTER.

SEPTEMBER 22ND, 1904.

CHAMBERS.

HANRAHAN v. WELLINGTON COLD STORAGE CO.

BAYLY v. WELLINGTON COLD STORAGE CO.

Venue—Change—Preponderance of Convenience—Witnesses—Expense—Fair Trial—Affidavits—Examination for Discovery.

Motion by defendants to change the venue from Ottawa to Guelph.

C. A. Moss, for defendants.

A. Hoskin, K.C., for plaintiffs.

THE MASTER.—Both actions arise out of work done for defendants at Fergus, in the county of Wellington. In the first action Hanrahan claims for services as an expert in devising cold storage systems. Bayly is the architect who was employed in the same work. The causes of action would seem, therefore, to have arisen in the county of Wellington. From this it may be inferred that the bulk of the evidence may be looked for there.

The distance from Guelph to Ottawa is over 300 miles, and the return fare is nearly \$16.

In the first action defendants swear to 20 witnesses, of whom 18 reside at or near Guelph. Plaintiff swears to 10 witnesses, all residing at Ottawa.

In the second action defendants swear to 11 witnesses, of whom 9 reside at or near Guelph. Plaintiff swears to 7

witnesses, all resident at Ottawa; of these he says 5 are experts, who will give professional evidence as to the value of his services. . . .

It seemed to me to be conceded on the argument that the two actions should be tried at the same time.

There has been no cross-examination on any of the affidavits. Assuming that they are correct, there would be a preponderance of 10 witnesses on the side of defendants in the two actions. This would be an extra cost in railway fares of at least \$160. There would be in addition the extra days of the witnesses in going to Ottawa and back, making at least \$30. and perhaps more, as the assizes at Ottawa usually last longer than at Guelph, making in all \$200.

On this ground, therefore, the motions are entitled to succeed.

Plaintiffs, however, state that they cannot have a fair trial at Guelph. For the reasons given in *Brown v. Hazell*, 2 O. W. R. 785, no weight can properly be given to such fears. If necessary, the presiding Judge will on request dispense with the jury.

It was further argued for plaintiffs that the examination for discovery of defendants' secretary shewed that the pleadings were misleading, and that on the trial of the real issues between the parties there could not be more than 3 or 4 witnesses on each side.

Mr. Moss objected that these depositions could not be used on the present motion; that, if such evidence was thought useful by plaintiffs, it should have been got by cross-examination on the affidavits filed in support of the motion. I reserve this question for future consideration, and at present give no opinion.

It is sufficient to say that I do not think we can now forecast the procedure at the trial with such confidence as to dispose of the motions on the ground of what will then take place.

In view of *Halliday v. Armstrong*, 3 O. W. R. 410, and *McDonald v. Dawson*, ib. 773, it is difficult to have a change of venue. Here there is no allegation of financial inability to take the necessary witnesses from Ottawa to Guelph—a circumstance to which great weight was attached in the last case.

Under all the facts now before me, I think the motions must prevail. It is also to be noted that if the cases go to Guelph they can be tried on 16th October. If at Ottawa not until the end of this year or even January next.

The costs as usual will be in the cause.

MAGEE, J.

SEPTEMBER 22ND, 1904.

WEEKLY COURT.

ST. LEGER v. T. EATON CO.

Party Wall—Excavations under—Rights of Adjoining Owners — Rights of Reversioners — Landlord and Tenant — Interim Injunction.

Motion by plaintiff for an interim injunction to restrain defendants from excavating so as to undermine a wall between plaintiff's and defendants' premises.

J. H. Moss, for plaintiff.

G. F. Shepley, K.C., for defendants.

MAGEE, J.—It is admitted by counsel for both parties that the wall in question is used as a party wall. This may mean, in the case of two adjoining owners of land, that part of the land covered by it belongs to one and part to the other, or that the whole belongs to both as tenants in common. In the absence of evidence to the contrary, the common user is prima facie evidence of a tenancy in common: *Cubitt v. Porter*, 8 B. & C. 257. Such a tenancy in this country is, I think, at least unusual in fact. In this case there is some evidence as to the ownership on the papers before me. . . . Upon the evidence, I would come to the conclusion that the wall is a party wall, but the land covered by it was owned partly by plaintiff's lessors and partly by defendants or their grantors of the adjoining property. Plaintiff is lessee. Defendants are assignees of the reversion (in fee, presumably) and owners of the adjoining property. They claim to be entitled to do what they have done in virtue of their rights in the party wall as owners of the adjoining property and also as plaintiff's landlords. Defendants are doing the work not for the purpose of renewing or repairing the party wall, but wholly for the purpose of constructing a wall beneath

it and supporting a wall above. Defendants are not confining their excavations or proposed construction to the width of the party wall, but are proposing to lay foundations (some 9 feet wide) for pillars, and about one-half of the width of these foundations of 10 pillars will be upon the land of which plaintiff is lessee. If defendants are entitled as of right to do this for a building six storeys high, then conceivably they could go all the way across plaintiff's premises for the foundations for a higher building.

Whether there was a tenancy in common in the land covered by the wall, or whether, as I think appears upon the evidence, that land was owned separately part by each, I do not know of any authority or principle which would entitle either owner to trespass by widening it upon the land of the other farther than the width of the existing foundation. . . .

Finding, as I do, a separate ownership to the line of the wall, I think defendants are entitled to cut upright channels in their side of the wall for the reception of pillars, not going beyond the separating line and not substantially weakening the wall so as to interfere with the right of support which plaintiff has in defendants' part of the wall. . . .

If there is a separate ownership, then neither owner in consenting to the erection of a party wall, in the absence of agreement, can be taken to have consented to burden his land with more than the wall actually constructed, whether that wall be 6 feet or 60 feet in height or length.

Unless, therefore, plaintiff is in some other way barred from objecting, defendants have no right, as adjoining owners, to construct a wall beneath the present one, and thereby encroach farther on plaintiff's land.

It was urged for defendants that plaintiff as tenant could not object to defendants as his landlords making the excavations beneath the wall, as they did not affect his beneficial enjoyment of the premises, and the lessor's covenant being merely one in the statutory short form for quiet enjoyment, that was the measure of her right as lessee, and that the excavations (except in so far as the actual damage which accrued was concerned) were not a breach. But during the term the lessee is in effect the owner, so far at least as to be entitled to prevent all intrusion, and even to make repairs a landlord has no right to enter during the term without a distinct stipulation to that effect: *Barker v. Barker*, 3 C. & P.; and may be restrained by injunction: *Stocken v. Planet Building Society*, 27 W. R. 877.

By this lease the lessor is entitled to enter and view the state of repair, but for no other purpose unless under the usual proviso for re-entry.

Then it is urged that there was on plaintiff's part not only acquiescence but license for the work done and proposed (other than the actual damage to the wall). This plaintiff denies, and he says he was only spoken to about the hoarding, and the evidence against him is not so clear as to disentitle him to have the question tried before his apparent right of property is interfered with.

The assertion that the injury to the wall arises from a drain on plaintiff's premises is not sufficiently proved by the evidence given.

For the present plaintiff is, I think, entitled to an interim order restraining defendants, their servants, etc., until the trial from entering upon or making excavations or erecting walls on the land covered by plaintiff's lease, and from interfering with the party wall beyond the line of that land, or so as to weaken the same or substantially lessen plaintiff's right of support from that part of it adjoining the part of the wall, and from interfering with that part of the wall adjoining plaintiff's line on the ground beneath the same, without taking all proper and necessary precautions to guard against injury to the wall.

Costs in the cause unless otherwise ordered by the trial Judge. The plaintiff to expedite the cause and bring it on for trial at the first available Court.

MAGEE, J.

SEPTEMBER 23RD, 1904.

WEEKLY COURT.

CITY OF HAMILTON v. HAMILTON STREET R. W. CO.

Street Railways—Contract with Municipal Corporation—Sale of Workmen's Limited Tickets—Specific Performance—Mandatory Injunction—Interim Order—Convenience.

Motion by plaintiffs for an interim injunction or mandamus commanding defendants to fulfil their contract with plaintiffs as to the sale of limited tickets.

W. R. Riddell, K.C., for plaintiffs.

E. D. Armour, K.C., and G. H. Levy, Hamilton, for defendants.

MAGEE, J.—Plaintiffs base their application upon defendants' agreements of 26th March, 1892, and 13th September, 1898, to perform, observe, and comply with all the terms of plaintiffs' by-law No. 624 passed 26th March, 1892, as modified by their by-law No. 955 passed 13th September, 1898. By-law No. 624 and the agreement of 26th March, 1892, are set out in the schedule to the Ontario statute respecting defendants, 56 Vict. ch. 90, passed in 1893 on defendants' petition, by which Act, among other things, defendants were empowered to issue debentures and to secure them upon the undertaking, assets, rights, powers, and franchises of defendants, including the rights, powers, and franchises under the said by-law and agreement, and provision was made for effectuating the security.

The by-law was passed to enable defendants to use electric power, instead of horses or mules, to which, as recited therein, defendants were previously by earlier city by-laws restricted.

By sec. 19 of this by-law No. 624 the following specifications regulating the running of the street railway shall be observed by defendants: (c) The company may charge and collect for every person on entering any of their cars, for riding any distance, a sum not exceeding 5 cents . . . and shall issue workmen's tickets at 8 for 25 cents good during the following hours, namely, 6.30 to 8 a.m., 11.50 to 1.30 p.m., 5.15 to 6.30 p.m., and shall also carry children between 5 and 12 years of age for a cash fare of 3 cents, or give 10 children's tickets for 25 cents. (o) Any conductor collecting more than the fare prescribed by the by-law shall, on conviction thereof in the police court, pay a fine of not less than \$5. (p) The company shall keep tickets for sale at some place in the business portions of the city, convenient for the people, and also upon their cars, and they shall sell tickets to persons desiring the same at a rate not exceeding 25 cents for 6 tickets for fare to any point within the city limits.

By the subsequent by-law No. 955 clause (c) of sec. 19 of by-law No. 624 was amended by providing that limited tickets may be used from 5 to 6.30 p.m., instead of from 5.15 to 6.30 p.m., and by adding thereto the following, "and shall give to any child between 5 and 14 years of age, when going to school, a ticket to go and return on the date of issue, for 5 cents. . . . The company shall put up inside each car . . . a notice stating the hours within which limited tickets may be used."

It is alleged in plaintiffs' statement of claim, which is verified by the affidavit of the assistant city clerk, that after the passing of the said by-law defendants sold upon their cars to all persons desiring the same limited tickets at 8 for 25 cents, marked "good only from 6.30 to 8 a.m. and 11.50 to 1.30 p.m., also 5 to 6.30 p.m.," and continued to sell such tickets in their cars until 1st September, 1904, and that on that date they ceased to sell at that rate on their cars tickets good during these hours, and that in August, 1904, defendants issued and posted in their cars and otherwise advertised a notice as follows: "The sale of workmen's tickets, 8 for 25 cents, will hereafter be strictly confined to workmen (or workwomen), and may be had at the company's head office, King street east, or the traction manager's office, corner James and Gore streets. For the convenience of workmen special arrangements may also be made for the sale of such tickets at offices of manufactures in different parts of the city, but such tickets shall not be sold on the cars."

It appears from the affidavits of Mr. Kent and two other deponents, described as labourers . . . that on 1st September, 1904, between 12 m. and 1 p.m., they severally, on defendants' cars, asked and offered to pay for the limited tickets at the rate of 8 for 25 cents, and were refused.

Plaintiffs claim specific performance of defendants' agreement and a mandamus or mandatory injunction to compel defendants to continue to sell upon their cars, to persons desiring the same, tickets for the conveyance of passengers on their railway at the price of 8 tickets for 25 cents, good during the hours above specified. . . .

Defendants' Act of incorporation empowered them to construct and operate their railway upon the city streets under and subject to any agreement to be made between them and the city council and under and subject to the by-laws of the city corporation made in pursuance thereof. They obtained from plaintiffs the use of the streets upon the faith of their agreement, and they should be required to live up to it, unless there is some strong reason to the contrary.

In reading the agreement it is difficult to come to any other conclusion than that the parties intended that all classes of tickets thereby provided for should be sold in places convenient for the public. . . . The word "tickets" in the clause as to sale in convenient places is not restricted . . . to the class of tickets mentioned later in the same clause, there being no specially connective word implying such restriction. . . .

[Reference to the judgment of Meredith, J., in *City of Hamilton v. Hamilton Street R. W. Co.*, ante 47.]

If, then, the agreement is binding on defendants, and they are committing a breach of it, what remedy is open? . . .

It is not necessary to consider here whether plaintiffs would be entitled to a mandamus, a question which was dealt with by the Court of Appeal in *City of Kingston v. Kingston, etc., Electric R. W. Co.*, 25 A. R. 462. If it is proper to issue a mandatory order, that is sufficient for plaintiffs at present.

Defendants say that plaintiffs should be left to an action for damages and to recover whatever they as a corporation could prove they had sustained. To offer that remedy is practically to say that defendants are entitled to break their agreement when they please. . . .

There is here, as it appears to me, no such difficulty in the carrying out of the order as has frequently led the Court to refuse to make a direction which it could not practically enforce. . . . Here it is asked that defendants be ordered to do something of the simplest character—to keep a certain class of tickets for sale and sell them. . . . It requires no skill, no outlay, no inconvenience, and no loss of profits, for defendants profess willingness to sell at the same price, but elsewhere.

It is not desirable that on an interlocutory application a conclusion should be expressed which the trial Judge, with the benefit of full argument after hearing further evidence, may be unable to agree with, and I was at first inclined to adjourn this motion till the trial. But the consideration of convenience on each side has led me to believe that it is better to make now the order which, as the case stands before me, seems to be the proper one. It causes no expense, trouble, danger of loss, or inconvenience to defendants, while, on the contrary, to let matters remain as they now are must daily entail either inconvenience to many persons in Hamilton, or a submission to pay fares upon which they did not count. . . . As in my view, on the facts before me, defendants are in clear breach of their agreement, it is more convenient that for the short time before the trial they should be made to keep matters as they were, than that many others should unfairly have to submit to even slight loss.

Defendants will until the trial be restrained from ceasing to keep for sale, and selling, and be ordered to

keep for sale, or sell, upon their cars, to workmen, at the rate of 8 for 25 cents, workmen's tickets such as provided for in clause (c) of sec. 19 of plaintiffs' by-law No. 624, and good during the hours mentioned in that clause, as modified by by-law No. 955; plaintiffs to be bound so to expedite the cause that it may without default of plaintiffs be entered for trial at the first sittings at Hamilton, and to enter it for trial then if in proper state for trial.

Costs of motion to be costs in the cause, unless trial Judge otherwise orders.

In restricting the order to a sale to workmen I do not desire to express any opinion as to defendants being bound to sell their tickets to any person applying for them, or as to who will be entitled to use the tickets. These questions may arise at the trial. . . .

SEPTEMBER 23RD, 1904.

DIVISIONAL COURT.

RE TAYLOR.

Will—Construction—Bequest to Widow—Dower—Election.

Appeal by Letitia Taylor, widow of John Thomas Taylor, from order of FALCONBRIDGE, C.J., in Chambers (3 O. W. R. 745) declaring that the appellant was put to her election whether she would take under her husband's will or take dower in his lands.

C. A. Moss, for appellant.

J. H. Spence, for executors.

V. A. Sinclair, Tilsonburg, for Rose Ann Sprowl.

C. A. Masten, for Jane Whalen and Ruth Lyman.

THE COURT (MEREDITH, C.J., IDINGTON, J., MAGEE, J.), allowed the appeal and made an order declaring that the appellant was not put to her election. Costs of all parties out of the residuary estate.

SEPTEMBER 23RD, 1904.

DIVISIONAL COURT.

PUGH v. HOGATE.

Costs—Taxation—Distribution between Plaintiff and Defendant — Plaintiff Failing on one Claim and Succeeding on Another—Jurisdiction of Taxing Officer—Objection—Waiver.

Appeal by defendant from order of ANGLIN, J. (3 O. W. R. 799), allowing appeal by plaintiff from taxation of defendant's bill of costs by the senior taxing officer at Toronto.

Grayson Smith, for defendant.

C. A. Moss, for plaintiff.

THE COURT (MEREDITH, C.J., IDINGTON, J., MAGEE, J.), dismissed the appeal with costs.

SEPTEMBER 23RD, 1904.

DIVISIONAL COURT.

STROUD v. SUN OIL CO.

Partition—Summary Judgment — Local Master—Appeal—Question of Title — Independent Title of Defendants—Direction that Action be Brought.

Appeal by plaintiff from order of BRITTON, J., in Chambers (3 O. W. R. 806), allowing appeal from a summary order for partition and directing that an action be brought.

J. Dickson, Hamilton, for plaintiff.

W. M. McClemon, Hamilton, for defendants.

THE COURT (MEREDITH, C.J., IDINGTON, J., MAGEE, J.), dismissed the appeal with costs to defendants in any event in the action to be brought, and extended the time for bringing the action.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING OCTOBER 1ST, 1904.)

VOL. IV. TORONTO, OCTOBER 6, 1904.

No. 6

FERGUSON, J.

MARCH 31st, 1904.

TRIAL.

GOSNELL v. TORONTO R. W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Contributory Negligence—Failure to Look a Second Time—Nonsuit.

Action for damages for injuries received by plaintiff by reason of an express waggon which he was driving being run into by a street car upon defendants' electric railway.

The plaintiff was driving east along Richmond street in the city of Toronto and the collision occurred when he was crossing Yonge street. The car was going south on the west side of Yonge street. The collision occurred at night.

The plaintiff in his evidence at the trial said that he could not see up Yonge street before arriving at the corner of Richmond and Yonge streets, owing to a large building at the corner.

"Q. When you reached that corner what did you do?

"A. I looked up and down to see if there were any cars coming, and there was none coming up, but I seen one coming down. It was about opposite the hotel there, coming down Yonge street. . . .

"Q. What rate was it going at?

"A. When I seen it first I could not say exactly, but when it came near me I know it must have been running about 10 miles an hour.

"Q. Did the car slacken its speed at all from the time you saw it?

"A. No, sir.

"Q. From the time you saw the car first, how far did you go before you were struck?

"A. I went from the crossing on to the track, where they struck me, and I was very near clear of it when they struck the hind wheels. . . .

"Q. Then the horse and yourself were past the line of the car that collided with you?

"A. Yes.

"Q. What became of you after the collision?

"A. I was thrown off the waggon on to the street. . .

"Q. How did you fall?

"A. I must have fell on my head when my head was cut. . . .

"Q. What injury did you sustain?

"A. My head was cut and my nose was broken. . . . My side, my hip, and my shoulder. I cannot use this arm yet. . . .

"Q. From the time that you saw the car until it struck you, could the car have been stopped?

"A. It could.

"Q. How?

"A. If they had the brakes on, they could stop it surely.

"Q. Did you hear whether any warning was given?

"A. I heard none at all. . . .

"Q. Was the gong sounded—was there any kind of warning by anybody?

"A. No.

"Q. No warning of the car?

"A. None that I heard.

"Q. You say that the car could have been stopped before it reached you?

"A. Yes. . . .

"Q. Have you ever crossed in front of a car at the same distance as this was and not received any injury?

"A. Yes, I have crossed them closer. . . .

"Q. From your experience as a driver did you think there was any danger in crossing that street at that time, under the circumstances?

"A. No."

On cross-examination:—

"Q. How long have you lived in Toronto?

"A. About 15 or 16 years.

"Q. Have you been driving all that time?

"A. Yes, sir.

"Q. So that you were accustomed to the cars?

"A. Yes, sir.

"Q. And you knew that the cars were running down Yonge street?

"A. Yes, sir. . . .

"Q. You were driving fast?

"A. Yes, the horse was trotting.

"Q. And did you pull the horse up?

"A. No. . . . I slacked a little when I was coming where I could see up and down the street. . . .

"Q. And when you looked up Yonge street whereabouts were you?

"A. I was on the crossing. . . .

"Q. And that is the first time you looked, when you were on the crossing.

"A. Yes.

"Q. And where did you see it?

"A. Right about opposite that hotel on Yonge street.

"Q. How far do you say that would be?

"A. It is about 100 feet or over. . . .

"Q. How long did you look up?

"A. I looked up, just turned my head, looked up that way, and seen the car coming.

"Q. Then turned it back again?

"A. Yes.

"Q. Driving across when did you look again for the car?

"A. I didn't look at all after for it.

"Q. Never looked again for it?

"A. No. . . .

"Q. If before your horse had got to the track you had looked for the car you could have seen it?

"A. Yes. . . .

"Q. You could have pulled it up, couldn't you?

"A. I could have.

"Q. You looked and saw the car 100 feet away from the crossing; then you made up your mind you would have time to cross Yonge street before that car would come down?

"A. Yes.

"Q. And you paid no further attention to the car and drove on?

"A. Yes. . . .

FERGUSON, J.: "Q. You saw the car and thought you would have time to cross before the car came down the street?

"A. Yes.

"Q. Did you base that upon the distance you had to go and the distance the car had to go?

"A. Yes.

"Q. Did it enter into your mind that the car would slack up?

"A. Yes, sir.

"Q. Then it was not based upon the distance alone?

"A. No.

"Q. You thought the car might slack up?

"A. They generally always do slack up at the crossing there; I have crossed it hundreds of times . . ."

J. MacGregor, for plaintiff.

J. W. Bain, for defendants.

FERGUSON, J.—There is no evidence of negligence on the part of the defendants that caused or materially contributed to the disaster, beyond the very weak evidence of the car having run at a high rate of speed. There is no evidence of negligence on the part of the driver of the car after he saw or ought to have seen the danger in which the plaintiff was. The plaintiff was, I think, guilty of negligence in endeavouring to cross Yonge street in front of the car after having seen the car approaching (100 feet away) without looking for the car again and governing his conduct according to appearances. He says if he had looked again for the approaching car he could have saved himself by pulling up his horse at any time before the horse got upon the railway track in fact.

The plaintiff was going along the southerly side of Richmond street when, as he says, he saw the car 100 feet up Yonge street, and he says that he made up his mind then that he could and would cross Yonge street in front of the car without looking for it again. This he attempted to do, and the collision took place.

It appears to me that according to the later cases, such as *Danger v. London Street R. W. Co.*, 30 O. R. 493, and *O'Hearn v. Town of Port Arthur*, 4 O. L. R. 209, 213, 217, the plaintiff was guilty of such contributory negligence as disentitles him to recover. It looks much as if the plaintiff had run into the car instead of the car having run into the plaintiff. The evidence of this contributory negligence comes out in the plaintiff's case, and there was no conflict of testimony. The doctrine of the *Wakelin Case*, 12 App. Cas. 41, applies, and a nonsuit should be entered. Action dismissed with costs.

SEPTEMBER 22ND, 1904.

DIVISIONAL COURT.

RE SOLICITORS.

Solicitor—Delivery and Taxation of Bill of Costs—Præcipe Order—Agreement with Clients—Special Order.

Appeal by clients from order of TEETZEL, J., 3 O. W. R. 771, reversing order of Master in Chambers, 2 O. W. R. 1082, and setting aside a præcipe order for delivery and taxation of a bill of costs, without prejudice to a special application, upon notice, for an order.

W. E. Middleton, for appellants.

E. E. A. DuVernet, for solicitors.

THE COURT (MEREDITH, C.J., IDINGTON, J., MAGEE, J.), suggested a different order from that appealed against, and the order suggested was accepted by counsel. It was as follows. The præcipe order to stand, a provision being added making it clear that the solicitors may raise the question of the agreement set up and their not being liable to render a bill, and the taxing officer to report specially. Costs, including the costs of the motion to set aside the præcipe order and of the two appeals, to be disposed of by a Judge in Chambers after the taxing officer's report.

MEREDITH, J.

SEPTEMBER 27TH, 1904.

CHAMBERS.

CANTIN v. NEWS PUBLISHING CO. OF TORONTO.

Discovery—Examination of Past Officer of Company—Rule 439a—Rule 485.

Appeal by plaintiff from order of Master in Chambers, ante 162, dismissing motion by plaintiff for an order to examine for discovery, under Rule 439 (a), as amended by Rule 1250, a person who was formerly a servant of the defendant company, but had ceased to be so.

W. N. Ferguson, for plaintiff.

Casey Wood, for defendants.

MEREDITH, J., agreed with the Master's opinion, and dismissed the appeal with costs to defendants in the cause.

SEPTEMBER 28TH, 1904.

C.A.

BILLING v. SEMMENS.

Master and Servant—Injury to Servant—Negligence—Dangerous Machinery—Defect—Want of Guard—Absence of Direct Evidence of Cause of Injury—Factories Act—New Trial—Appeal.

Appeal by defendants from order of a Divisional Court (3 O. W. R. 17, 7 O. L. R. 340) setting aside nonsuit and directing a new trial.

W. R. Riddell, K.C., and G. L. Smith, for defendants.

J. W. Nesbitt, K.C., and J. G. Gauld, Hamilton, for plaintiff.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) dismissed the appeal with costs.

CARTWRIGHT, MASTER.

SEPTEMBER 29TH, 1904.

CHAMBERS.

DUNSTON v. NIAGARA FALLS CONCENTRATING CO.

Particulars—Statement of Defence—Application before Examination for Discovery—Particulars for Pleading—Particulars for Trial—Affidavit in Support of Application.

Motion by plaintiff for particulars of paragraphs 3, 4, and 5 of the statement of defence.

A. R. Clute, for plaintiff.

A. B. Armstrong, for defendants.

THE MASTER.—The statement of claim alleges that plaintiff and defendants on 10th October last agreed that plaintiff should make certain labels for defendants for \$392.79; that plaintiff duly in accordance with said agreement made and tendered said labels, but defendants refused to accept or pay for same.

The statement of defence, after usual denial of the plaintiff's allegations, pleads the Statute of Frauds (paragraph 2); says (paragraph 3) goods not of good quality or workmanship; (paragraph 4) not equal to sample agreed on by parties; (paragraph 5) not fit for purpose of defendants' business, for which plaintiff well knew they were intended.

On 23rd instant plaintiff demanded particulars in writing of paragraph 3 as to want of good quality and workmanship; paragraph 4, respects in which the goods manufactured by the plaintiff were not equal to sample; and paragraph 5, of respects in which said goods were not fit for purpose of defendants' business.

The cause is not at issue yet.

The motion is supported only by affidavit of plaintiff's solicitor that he believes "plaintiff cannot safely proceed to trial without delivery by defendants of the particulars demanded."

In *Uda v. Algoma Central R. W. Co.*, 1 O. W. R. 246, Meredith, C.J., relied in part on the fact that there was no affidavit from the plaintiff that the nature of the defence intended to be set up was not known to him.

What necessity there can be for the particulars for the purposes of reply is not apparent, nor does the affidavit state any. It may be assumed that there was a certain amount of correspondence leading up to the alleged documents, and subsequent letters stating refusal of defendants to accept, and their reasons for such refusal.

However that may be, there is yet plenty of time to examine some officer or servant of defendant company, who will be bound to inform himself fully of the facts relied on by way of defence.

Until this has been done the motion is, in my view, premature: see *Becker v. Dedrick*, 2 O. W. R. 786; *Quebec Bank v. Phoenix Ins. Co.*, 3 O. W. R. 603; and cases referred to in these decisions.

If after discovery has been had the plaintiff is still of opinion that he cannot safely proceed to trial, he can renew this motion.

At present I think that it cannot succeed, and should be dismissed with costs to the defendants in the cause.

SEPTEMBER 29TH, 1904.

DIVISIONAL COURT.

RE MCLEOD AND TOWN OF EAST TORONTO.

Municipal Corporations—Annexation of Town to City—Petition for Submission of By-law—Numbers and Qualifications of Petitioners—Delegation—Withdrawal of Names—Addition of Names—Mandamus—Time.

Appeal by town corporation from order of ANGLIN, J., ante 26, directing the appellants to submit to the ratepayers a by-law for the annexation of the town to the city of Toronto.

W. Proudfoot, K.C., for appellants.

W. E. Middleton, for Alexander McLeod.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) dismissed the appeal with costs, but modified the order by extending the time for taking the vote of the electors for 4 weeks from 3rd October, 1904, and by adding that nothing contained in the order is to interfere with the right, if any, of the council to act under secs. 336, 337, and 337a of the Municipal Act.

SEPTEMBER 29TH, 1904.

C.A.

BOYLE v. CITY OF GUELPH.

Way—Non-repair—Injury to Traveller—Death—Action by Widow—Negligence of Municipal Corporation—Dangerous Condition of Highway—Open Ditch—Proximate Cause of Injury—Contributory Negligence—Intoxication—Damages.

Appeal by defendants from judgment of BRITTON, J., 3 O. W. R. 322. Cross-appeal by plaintiff for increased damages.

D. Guthrie, K.C., and W. R. Riddell, K.C., for defendants.

J. E. Day and J. M. Ferguson, for plaintiff.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.), dismissed the appeal and cross-appeal, both with costs.

THE
ONTARIO WEEKLY REPORTER

(TO AND INCLUDING OCTOBER 8TH, 1904.)

VOL. IV. TORONTO, OCTOBER 13, 1904. No. 7

CARTWRIGHT, MASTER.

OCTOBER 1ST, 1904.

CHAMBERS.

CITY OF TORONTO v. TORONTO R. W. CO.

(TWO ACTIONS.)

*Trial—Postponement—Determination of Questions Arising
in another Action Pending.*

Motion by the defendants to postpone the trials of these actions.

James Bicknell, K.C., for the defendants.

J. S. Fullerton, K.C., for plaintiffs.

THE MASTER.—In these, and several other similar actions, the plaintiffs seek to recover a penalty of \$100 a day for a period of 4 months more or less, amounting to about \$12,000. The cause of each action is the alleged violation by defendants of the terms of the contract made between the parties on 1st September, 1891.

These violations may be shortly described as non-observance by defendants of the time table approved by the city council on 11th April, 1904, and forwarded to defendants on the following day.

The parties have from the first differed and continued to differ as to the true meaning and interpretation of the original agreement.

An action was commenced on 20th April, 1903, to have a declaration of the rights of the parties under that agreement. This action is still pending; and in it a special case has been stated "to obtain the opinion of the Court upon certain questions of law arising in the construction of the agreement on which the action" (known, I may remark, as "the omnibus action") "is brought."

These questions are as follows:

Is the city or the railway company, and which of them, on the proper construction of the agreement, entitled to determine, decide upon, and direct—

2. What time tables and routes shall be adopted and observed by the company?

The final answer to this question will practically settle all these actions brought to recover the \$100 a day penalty.

The statement of defence disputes the interpretation of the agreement relied on by the plaintiffs. It admits non-compliance with the time table of 12th April, 1904, but excuses it, on the ground that the defendants had not sufficient cars, and were unable to procure any, as their contract with the plaintiffs obliged them to have all their cars manufactured in Toronto.

The policy of the law now requires the determination of all questions between the same parties arising out of the one contract to be disposed of in one action and at one time as far as possible.

Here there can be no objection to postponement on the usual grounds of loss of claim or loss of evidence, as the fact of non-compliance is admitted by defendants.

From the past and present attitude of the parties it is almost certain that this question, No. 2 of the special case, will be carried as far as the parties can take it. It arises fairly and unavoidably in the special case to which the parties have agreed, and it does not seem that any good result can accrue from a trial of the penalty actions before the special case has been finally disposed of.

The motions will therefore be granted with costs of same in the cause.

CARTWRIGHT, MASTER.

OCTOBER 3RD, 1904.

CHAMBERS.

ARMSTRONG v. ARMSTRONG.

Costs—Depriving Successful Party—Good Cause—Misleading Conduct before Action.

Motion by plaintiff for leave to discontinue the action and for an order on defendant to pay the costs, or for such disposition of costs as might seem fit.

J. H. Spence, for plaintiff.

Shirley Denison, for defendant.

THE MASTER.—The solicitors for the parties reside in different county towns. The evidence of the facts on which plaintiff relies is wholly documentary. Although affidavits have been filed on both sides, there is no conflict between them on any material point. . . .

It is clear from *Huxley v. West London Extension R. W. Co.*, 14 App. Cas. 26, that the successful party cannot be deprived of costs unless there is good cause.

The question therefore is: Do the facts of this case establish the existence of such good cause?

To answer this question intelligently the facts must be stated at some length.

Plaintiff is the widow of defendant's son George, who died 1st October, 1903.

At the time of his death there were two policies on his life, one for \$500 and another for \$2,000. These were handed over after his death by the widow to her husband's brother Joseph. He afterwards sent her \$600, with which the funeral expenses of deceased and other liabilities were paid.

The widow was under the impression that she was entitled to receive \$1,500 from the proceeds of the insurances. In consequence, on 26th January, 1904, her solicitor wrote to Joseph Armstrong stating that the widow understood that her husband had policies of \$500 and \$2,000 respectively on his life, out of which, by his dying declaration and attempted disposition, she was to receive \$1,500, and that

if these policies "were originally payable to deceased's mother" and were not altered by Mr. A., through illness and reliance on the assurances that his wishes would be carried out, it would be a fraud upon his widow. To this letter the only reply sent was a letter from the solicitor who is acting for defendant. It was as follows, and bears date 1st February, 1904.

"Dear Sir, "Re Estate late George C. Armstrong.

"Your letter to Mr. Joseph D. Armstrong has been handed to me for reply and to inform you that there was no \$1,000 policy in force that he knows of on his late brother's life, but there were policies for \$500 and \$2,000, both of which were originally and always payable to, his mother, and so formed no part of his estate. The \$600 was sent by Mr. Joseph D. Armstrong to his brother's widow as a matter of kindness on his part and out of sympathy to her and not because of any responsibility to pay her anything."

On receipt of the above plaintiff's solicitor wrote at once a letter bearing date 4th February, 1904, the material parts of which are as follows:—

"Dear Madam,—

"On instructions of Mrs. Claribel Armstrong, your daughter-in-law, I recently addressed to your son, Joseph D. Armstrong, a letter upon the subject of the remittance to my client of the further sum of \$900 due to her, to make up the \$1,500 which, by her husband's dying declarations, was set apart for her out of the \$2,500 of insurance he carried on his life. To that letter (your solicitor) has replied setting up the claim that all of the \$2,500 was by the terms of the policies payable to you, and I presume contending that for that reason my client could have no claim upon it.

"If, as alleged, the policies provided that the insurance moneys when due thereunder should be paid to you, I must take it that your son Joseph has been acting as your agent and under your instructions in the way he has dealt therewith, as he could only get possession of these funds through you."

To this letter a reply was sent by the same solicitor dated 5th February, 1904:— . . .

"Dear Sir,— "Re Estate George C. Armstrong.

"Your letter to Mrs. Mary Ann Armstrong has been handed to me. Of course we cannot prevent your bringing

an action, if so advised, although we cannot imagine the grounds upon which it is likely to be sustained. . However, it you insist upon doing so and send the writ to me, I will accept service and undertake to appear for the defendant."

On receipt of this plaintiff's solicitor commenced the present action against the mother of her husband, relying on the statement made by her solicitor in his letter of 1st February, 1904, that there were policies for \$500 and \$2,000, both of which were originally and always payable to his mother. It was not until some time in June that it was discovered that the policies had been assigned to Joseph Armstrong, with the consent of the mother, to whom they were originally payable. Thereupon plaintiff applied to defendant's solicitor to be allowed to discontinue without costs. This was refused. The present motion was therefore necessary under Rule 430 (4).

It was strongly argued for defendant that plaintiff's solicitor was in fault in relying on the statements made by the other side. Mr. Denison pointed out that the true facts might easily have been obtained from the insurance companies, and the present mistake thereby avoided. It must be conceded that defendant's solicitor might have declined to give any information and have advised plaintiff's solicitor to have applied elsewhere. This, however, he did not do. On the contrary, the language of his letter of 1st February is clear and unambiguous. There can be only one interpretation of the words that both the policies "were originally and always payable to the mother." 'After that had been received plaintiff's solicitor wrote to defendant stating that her present solicitor had written that the policies were payable to her. This letter was handed by defendant to her solicitor, as he says, so that he knew that plaintiff's solicitor was relying on a statement made by him, which was incorrect. Whether he knew this to be so or not, does not seem material. He cannot be heard to excuse himself in this way, so as to free his client from the responsibility arising from her erroneous instructions, to which alone his mistake must be attributed. It is to be observed that in this case there is no conflict as to what occurred between the parties. They and their respective solicitors lived in different towns, and, so far as appears, there were no interviews or conversations, about which parties may and often do honestly differ. Here fortunately everything material is in writing, and the result which I have reached is that the plaintiff's

motion should prevail, and that the action should be discontinued without costs to either party.

By the letter of 1st February, plaintiff's solicitor was led to believe that the policies "were originally and always payable to the mother," not as he had thought (and rightly) to Joseph, as appears from the letter of 4th February from plaintiff's solicitor to Mrs. Armstrong, the defendant.

I cannot but think that the incorrect statement of defendant's solicitor was the direct cause of the present action. He was not obliged to make any statement. But, having done so and misled plaintiff, his client must not complain of the result of this motion. I cannot give plaintiff more, but I do not think her entitled to less.

IDINGTON, J.

OCTOBER 3RD, 1904.

CHAMBERS.

RE SMITH.

Will—Construction—Devise—Estate in Tail Male—Restrictions on Sale—Repugnancy.

Motion by John Smith Read, a devisee under the will of John Smith, late of the township of St. Vincent, farmer, deceased, for an order construing the will and codicil, and declaring the rights and interests of all parties mentioned therein.

The will was made on 7th January, 1865. By it the testator devised the north half of lot 26 in the 10th concession of St. Vincent and all other real estate he might die possessed of to his wife Jane Smith for her natural life, and on her death to John Smith Read, his heirs and assigns forever. In the event of his wife's death before or at the time of his own death he directed his executors to take possession and charge of all his real and personal estate as aforesaid, to collect or to receive all rents, debts, and other revenues accruing therefrom, and to invest the proceeds for the benefit of John Smith Read until 7th December, 1878, when they should pay over the same to him, less expenses and compensation for their trouble. The 5th paragraph said: "I will,

order, and direct that the said John Smith Read shall not be entitled to the possession of such real estate until the said 7th day of December, 1878." Paragraph 6: "Should the said John Smith Read die before coming into possession of my said real estate as above mentioned, I hereby authorize and empower my said executors to sell and dispose of all my said real and personal property and to divide and pay the proceeds thereof equally among the then surviving brothers and sisters of the said John Smith Read."

The testator made a codicil on 5th October, 1871, which expressly directed that it should be taken as part of the will, and which republished and confirmed the will so far as not altered thereby. The codicil provided: "If the said John Smith Read die without male issue, I will and bequeath the said real estate be not sold, but that it become the property of George McCleave Read, brother of the said John Smith Read, and should the said George McCleave Read die without male issue I will and bequeath the said real estate to Nicholas Robert Read, brother of the said John Smith Read and George McCleave Read. It is also my wish that the said real estate be not sold during the lives of the above named John Smith Read, George McCleave Read, and Nicholas Robert Read."

The testator died childless on 28th October, 1871, leaving as his widow her to whom he had by the will devised the land for life, and she survived until 7th August, 1886, and then John Smith Read entered into possession of the land and had since continued in possession.

At the time of this application John Smith Read had five children and his brothers also had each a child or children.

W. E. Middleton, for applicant.

R. W. Evans, Owen Sound, for adult respondents.

J. W. Frost, Owen Sound, for infant respondents.

IDDINGTON, J.—It is to be observed that the will and codicil were both made and came into effect by the testator's death before sec. 32 of the Wills Act, or its original enactment, introduced into this country the change it made in regard to such expressions as used in this codicil.

The first question is, whether . . . John Smith Read takes an estate in fee simple free from all restrictions.

To answer that affirmatively would be, in effect, to declare the codicil a nullity. Now, reading both together, I think not only that some effect can be given to the codicil, but that some if not all of what the testator intended can be carried out.

I therefore answer this question in the negative.

I also answer the second question in the negative. I think if the testator had intended to limit his purposes in the making of the codicil to the time of "coming into possession" he would have referred thereto in words that in some way imported that. Those he did use are obviously intended to have a wider scope, and point altogether in a different direction.

The third question is, whether the words in the codicil "die without male issue" create an estate tail male in favour of the applicant, which would enable him to bar the entail under R. S. O. 1897 ch. 122, and so become the owner in fee simple.

My answer to this question is, that the words "die without male issue" do not, of and by themselves, create an estate tail male, but that, the will and codicil being read as a whole, these words define, as the law then stood, the limitations of the estate that the will and codicil were intended when read together to create.

Evidently, they give, I think, an estate tail male to John Smith Read in remainder after the life estate to the widow. That came into possession of John Smith Read in 1886, and can be barred by John Smith Read as provided for by the statute referred to, and by virtue thereof he can convey the fee simple.

The 8th question is, whether the restrictions on sale are not repugnant and void in any event.

I think the restrictions on the sale of the lands are so repugnant to the estate or estates created as to be void. . . .

In answer to the 9th question, I think a valid conveyance of the said lands in fee simple can be made if executed by John Smith Read and his brothers Nicholas Robert Read and George McCleave Read and the surviving executors. . . .

[Reference to Theobald on Wills, 4th ed., pp. 341, 344; Little v. Billings, 27 Gr. 353; Nason v. Armstrong, 21 A. R. 182; O'Reilly v. Currie, 11 U. C. R. 55; Fraser v. Bell, 21 O. R. 455; Jarman on Wills, 5th ed., p. 860; Re Brown and Slater, 5 O. L. R. 386; In re Rosher, 26 Ch. D. 601.]

MEREDITH, J.

OCTOBER 4TH, 1904.

CHAMBERS.

RE WEST ALGOMA VOTERS' LISTS.

Parliamentary Elections — Preparation of Voters' Lists — Unorganized District—Franchise Act, 1898, sec. 9—Order in Council—Powers of Governor-General in Council—Appointment of Officers to Prepare Lists—Proceedings of Officers—Prohibition—Powers of High Court.

Motion by A. C. Boyce, an elector in the district of West Algoma who proposed to be a candidate for its representation in the House of Commons, for prohibition to Jacob Stevenson, appointed enumerator for that district by an order of the Governor-General in council, and to the junior Judge of the County Court of Algoma, and to W. G. Quibell, police magistrate for Algoma, to prohibit these persons from proceeding with the preparation of voters' lists.

J. W. St. John, for applicants.

W. Barwick, K.C., for the Minister of Justice for Canada.

J. H. Moss, for the Secretary of State.

A. Mills, for the respondents.

MEREDITH, J.—There are involved in this application two questions of considerable importance: (1) whether the order in council in question is, or the proceedings of the respondents, acting under it, are, ultra vires; and, if so, (2) whether this Court has power to prohibit such proceedings.

The more correct way of dealing with these questions is to consider the latter first, because, if this Court have no jurisdiction, it is better to express no opinion upon the merits of the application; if there has been bad faith or any sinister or improper conduct, such as has been charged, in matters quite within the powers of those whose conduct has been called in question, they are answerable, not to this Court, but to Parliament, and Parliament to the people; and any alleged wrong-doing may perhaps also be the subject of investigation, and of some measure of relief, if established, in the Federal Election Courts.

Then, is there jurisdiction in this Court?

If the circumstances which warrant the Governor in council in acting under sec. 9 of the Franchise Act, 1898, never existed, I would have little doubt of such jurisdiction. One of the foremost duties of this Court is the prevention of the exercise of usurped judicial power. It can hardly be doubted that if any one, without colour of right, should usurp the judicial functions pertaining to the preparation of voters' lists, the power and duty to prohibit must rest somewhere; and I know of no other Court than this in which such power and duty exist, in respect of such an usurpation within this Province.

But it is said that in the North Perth Case, 21 O. R. 538, there was a decision of a Divisional Court to the contrary. With that statement I am unable to agree. The two cases are widely different. When that case was decided there existed officers and Courts appointed and constituted under Federal legislation for the very purpose of dealing with the whole subject of voters' lists for Parliamentary elections: the whole of that legislation has been repealed: no such officers or Courts now exist. The holding in the North Perth Case was that this Court could not interfere with such Federal Courts in respect of such voters' lists. In this case the main question is, does any Federal Court exist? Have the respondents any authority whatever in law for the exercise of any judicial functions in respect of such lists? If not, there must be power somewhere to prohibit, and that power can be found in this Court only.

Whether the respondents have, or have not, any such power depends upon the proper interpretation of sec. 9 of the Franchise Act, 1898. That Act entirely repealed the Electoral Franchise Act, under which the Federal Courts were constituted. It changed completely the whole law in regard to the preparation of the voters' lists, adopting the provincial lists, instead of having parliamentary lists prepared, as provided for in the repealed enactment. But, to provide against the possibility of there being no sufficiently recent provincial lists in some of the electoral districts, the 9th section of the Act was passed: it is—as amended—in these words:—

“Where under the laws of a province the voters' lists for any provincial electoral district or division or any of them are prepared not at regular intervals, but at such times as are fixed by the Lieutenant-Governor in council or some other provincial or local authority or only from time to time

for the purpose of any Dominion election in the territory comprised in such provincial electoral district or division or the parts thereof for use in which they were prepared, if such lists have been prepared not more than one year before the date of the writ for such Dominion election; otherwise new voters' lists shall be prepared, and for the purpose of preparing and giving effect to such voters' lists the Governor in council may appoint all necessary officers and confer upon them all necessary powers, and in the preparation and revision and bringing into force of such new voters' lists the provisions of the laws of the province regulating the preparation and revision and bringing into force of the provincial voters' lists in such cases shall, as far as possible, be observed and followed: Provided that, if in any such case voters' lists have been prepared under this section not more than one year before the date of the writ for such election, new lists shall not be prepared, but the lists so prepared shall be used unless there are lists of a later date prepared under the provincial laws."

For the district in question there are in existence no lists prepared at any regular intervals, but there are lists in course of preparation under a provincial enactment which requires their preparation at regular intervals.

The purpose of the section is to ensure reasonably recent lists for parliamentary elections: it can, therefore, hardly mean that when a provincial enactment requires the lists to be prepared at regular intervals those lists only shall be used no matter how long it may be necessary to wait until they are prepared; it means rather that when such lists exist—"are prepared" in fact—they shall be used, but when they do not exist the mode of preparing them provided in the section may be adopted. It was, therefore, on the facts of this case, within the power of the Governor in council to appoint all necessary officers for the preparation of the lists, thus making them officers of a Federal Court, just as the revising barristers were under the repealed enactment; but they are expressly required by the enactment to observe and follow as far as possible the provisions of the laws of the province regulating the preparation and revision and bringing into force of the provincial lists.

But it is said that the order in council appointing the respondents presumes to give directions to them in conflict with the latter statutory requirement. The answer to that is, if it be so, the order, to that extent, has no effect; the statute, not the order in council, is to be obeyed.

Then it is urged that, assuming the appointment of the respondents to be valid, they are not proceeding in some respects in accordance with the statute, but are acting to some extent in contravention of it. The answer to that—if it be so—is the answer which was given to the applicant in the North Perth Case—the subject is one committed to them exclusively by Federal legislation, and one affecting matters particularly within the exclusive powers of Parliament; they are answerable to Parliament, not to this Court, on such an application as this.

A point of some importance—not argued—is whether Parliament has, in sec. 9, delegated to the Governor in council the constitution of a Federal Court, and if so, whether there was power to do so. The answer is, there is no such delegation, that the enactment itself constitutes the Court and prescribes its procedure, and that to the Governor in council is committed nothing substantially but the appointment of the officers; the putting in motion of the provincial machinery operated by Federal officers.

The application therefore fails and must be dismissed.

OCTOBER 4TH, 1904.

DIVISIONAL COURT.

RE WILLIAMS v. BRIDGMAN.

County Court—Jurisdiction—Attachment of Debts—Assignment of Moneys Due to Judgment Debtor by Garnishee—Assignee as Claimant—Issue—Amount Involved—Claim for Equitable Relief—Prohibition—Transfer to High Court.

Appeal by claimant from order of TEETZEL, J., ante 53, dismissing appellant's motion for prohibition against further proceedings in a garnishee matter pending in the County Court of Elgin, or in the alternative to transfer the issue directed to be tried to the High Court.

W. M. Boulthbee, for appellant.

W. J. Tremecar, for judgment creditor.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER.

OCTOBER 7TH, 1904.

CHAMBERS.

PERRINS (LIMITED) v. ALGOMA TUBE WORKS
(LIMITED).

*Discovery—Examination of Officer of Foreign Corporation—
Provisional Director—Officer out of the Jurisdiction—
Rule 439 (a).*

Motion by plaintiff for leave to examine for discovery, at Philadelphia, one John S. Freeman, a director of the defendant corporation.

C. A. Moss, for plaintiffs.

W. E. Middleton, for defendants.

THE MASTER.—The motion was resisted on two grounds. The first was, that Mr. Freeman was only a provisional director of the defendant company, which was incorporated under R. S. O. 1897 ch. 191, by letters patent dated 30th December, 1902, but that no steps had been taken "for organizing the company for commencement of business."

To this it was replied that sec. 41 of the above Act is a sufficient answer. It provides that "the persons named as provisional directors in the special Act, or in the letters patent, shall be the directors of the company until replaced by others duly elected in their stead." With that contention I agree.

The second ground of opposition was, that there is no provision in the Rules for the examination for discovery of an officer of a foreign corporation, who is himself resident out of the jurisdiction. The argument was developed in the way following. In the Rules, at p. 65, we find that chapter VII. is headed "Discovery." This is then subdivided.

1. Examination for Discovery (439-462).
2. Production and Inspection of Documents (463-474).
3. Miscellaneous (475-477).

It was argued that all the provisions for examination for discovery are to be found under the first sub-head,

and that the language of Rule 439 (a), as it now stands (amended by Rule 1250), is inapplicable to a case like the present, because an officer out of the jurisdiction cannot "be compelled to attend and testify, in the same manner and upon the same terms and subject to the same rules of examination as a witness." That this is the case is shewn by *Central Press Association v. American Press Association*, 13 P. R. 353.

It was further argued that recourse must, therefore, be had to Rule 477; but that this Rule only speaks of "parties residing out of Ontario;" and that an officer of a litigant corporation is not a party, nor in a similar position in regard to discovery, as his examination cannot be used as evidence at the trial.

These objections, though sufficiently formidable to require attention, are perhaps not insuperable.

Against them all is, first, the uniform practice heretofore to the contrary. This is entitled to great weight, though the maxim "*communis error facit jus*" may not be strictly applicable.

It has, however, often been said by Judges of eminence that it is more necessary that the practice should be settled than that it should be technically correct.

The argument based on the heading and sub-heads of chapter VII. seems to be displaced by Rule 7, which says that "the division, etc., of these Rules shall not affect their construction."

The more serious argument founded on the language of Rule 439 (a) can reasonably be met by considering the origin of the practice as to discovery, and the method of obtaining it in the case of corporations.

The matter is discussed in *Bray on Discovery*, pp. 73-77, and in the judgment of Jessel, M.R., in *Wilson v. Church*, 9 Ch. D. at pp. 555, 556.

Formerly it was necessary to make an officer of the defendant corporation a party for purposes of discovery.

This is no longer necessary after Order XXXI., r. 5, which is the equivalent of our Rule 439 (a).

At present, therefore, in such cases, some suitable officer of the corporation is to be deemed to be a party for the purposes of discovery, and is substantially covered by the word "parties" in Rule 477 to that extent.

It was further urged that, if Mr. Freeman refused to attend, the order would be nugatory and therefore should not be issued.

As to this it is sufficient to say that the Court will not presume that the defendant company has come in and submitted to the jurisdiction only to set its order at defiance. When this contempt has manifested itself, it will be time enough to consider what relief (if any) can be given to the plaintiff company.

In the meantime the order will go with costs in the cause.

If the view of the learned counsel for the defendants is right, he will have rendered good service by calling attention to an evil which will doubtless be promptly met by an adequate remedy. See as to this *Macdonald v. Norwich Union Ins. Co.*, 10 P. R. 462 at p. 464, last paragraph.

BRITTON, J.

OCTOBER 7TH, 1904.

WEEKLY COURT.

ASKWITH v. CAPITAL POWER CO.

Evidence—Reference to Master for Trial—Rulings on Evidence—Interlocutory Appeals—Admission and Rejection of Evidence—Interpretation of Contract—Form of Questions.

Appeal by plaintiffs from report of local Master at Ottawa upon a reference to him for trial under sec. 29 of the Arbitrations Act, R. S. O. 1897 ch. 62.

W. J. Code, Ottawa, for plaintiffs.

T. A. Beament, Ottawa, for defendants.

BRITTON, J.—The appeal was against the ruling of the Master in admitting and rejecting evidence, that is, in allowing certain questions to be put to a witness called on behalf of defendants, and in disallowing a certain question put on cross-examination of that witness. . . . Following *Markle v. Ross*, 13 P. R. 135, I hold that an appeal lies

in such a case. . . . In a case being tried by the Master upon a reference to him for that purpose, there should not be an appeal upon every interlocutory ruling.

On the merits, the ruling of the Master was right in each instance. The question put by counsel for plaintiffs to the witness R. W. Farley and disallowed by the Master was in form wrong. It was stated on the argument that the witness under examination is the person who, as between plaintiffs and defendants, is to interpret the contract. He may be asked what he did in reference to the work done or omitted, or what he said to plaintiffs in reference to the contract or work done or to be done. It is objectionable to ask this witness the meaning of any clause in the contract and still more objectionable to ask him what a clause "was intended to mean."

Appeal dismissed with costs to defendants in the cause.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING OCTOBER 15TH, 1904.)

VOL. IV. TORONTO, OCTOBER 20, 1904.

No. 8

OCTOBER 10TH, 1904.

C.A.

REX v. WHITESIDES.

Criminal Law—Conviction under Liquor License Act—Warrant of Commitment—Arrest in another County—Warrant not Indorsed by Justice of that County—Habeas Corpus—Conviction for Second Offence—Form—Finding of Previous Conviction—Order of Proceedings—Amendment.

Appeal by prisoner from order of ANGLIN, J., ante 113, upon the return of a habeas corpus and certiorari in aid, refusing to discharge the prisoner and remanding him to the custody of the keeper of the common gaol of Northumberland and Durham. The prisoner was in custody by virtue of a warrant of commitment issued upon his conviction by the police magistrate for the town of Bowmanville and county of Durham on 11th July, 1904, for selling liquor without license. He was sentenced to imprisonment with hard labour for 4 months as for a second offence against the Act, sec. 72. The gaoler made his return to the habeas corpus, assigning the warrant of commitment as the cause of detention. The conviction and proceedings before the magistrate were returned upon the writ of certiorari in aid, and an amended conviction was also returned. It was objected that the warrant was defective in form; that the arrest thereunder was irregular or void, the warrant not having been backed by a justice of the peace of the county of Victoria, in which county the prisoner was arrested, and whence he was taken to gaol at Cobourg. It was contended that the conviction, as well in its amended as in its original form, was invalid, as the finding in respect of the previous conviction was omitted in the latter and improperly set forth in the former, and also because the magistrate had entered upon the inquiry as to the previous conviction before adjudicating upon the guilt of the prisoner in respect of the

charge then before him, contrary to the provisions of sec. 101 of the Liquor License Act.

W. J. Tremear, for the prisoner.

J. R. Cartwright, K.C., and McGregor Young, for the Crown.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

OSLER, J.A.—All the objections urged against the proceedings fail. The second deposition of Chief Constable Jarvis shews that the magistrate had already adjudicated upon the charge laid in the information then before him before entering upon the inquiry as to the fact of the previous conviction. The affidavits from which it was argued that he had probably not done so are too vague and indefinite to warrant an assumption to the contrary of the deposition; but the amended conviction, though carelessly prepared and not following accurately the form given in the schedule to the Act, may be upheld, although it states the previous conviction as if the magistrate had then adjudicated and made it, instead of stating it as a fact found upon inquiry after conviction on the charge then before him. If necessary, the conviction may be amended upon the evidence: 1 Edw. VII. ch. 13 (O.); Criminal Code, secs. 889, 896. Under these circumstances, a defect in the warrant of commitment will not aid the prisoner: *In re Shuttleworth*, 9 Q. B. 650, 658: though it might be different if the conviction were not before the Court, and nothing appeared to support the detention but a defective warrant: *In re Timson*, L. R. 5 Ex. 257. But in form there is no substantial objection even to the first warrant of commitment. It follows with reasonable fidelity the form schedule L. of the Act, and avoids, as also does the conviction, the mistake the draftsman has fallen into of attaching a punishment of 3 months' imprisonment, instead of 4, to a second offence.

There is nothing in the objection that the arrest was made in the county of Ontario without the warrant having been backed by a justice of that county. The warrant of commitment is sufficient to justify the prisoner's detention in the gaol of the proper county, and the Court will not, on habeas corpus, inquire into any irregularity in his caption. The distinction in this respect between the practice in criminal and civil cases has been settled too long and too firmly to admit of the point being now debated: *Rex v. Marks*, 3 East

157; Ex p. Kraus, 1 B. & C. 258; Ex p. Scott, 9 B. & C. 446; Eggington's Case, 2 E. & B. 717. . . .

[Regina v. Jones, 8 C. L. T. Occ. N. 332, overruled.]

Appeal dismissed.

ANGLIN, J.

OCTOBER 11TH, 1904.

CHAMBERS.

DUNSTON v. NIAGARA FALLS CONCENTRATING
CO.

Particulars—Statement of Defence—Application before Examination for Discovery—Particulars for Pleading—Particulars for Trial—Affidavit in Support of Application.

Appeal by plaintiff from order of Master in Chambers, ante 218, dismissing motion by plaintiff for particulars.

A. R. Clute, for plaintiff.

A. B. Armstrong, for defendants.

ANGLIN, J., dismissed the appeal.

OCTOBER 11TH, 1904.

DIVISIONAL COURT.

BLEASDELL v. BOISSEAU.

Judgment—Set-off of Judgment Purchased by Defendant—Equitable Right—Discretion—Attachment of Debts.

Appeal by defendant from order of ANGLIN, J., ante 155, reversing order of Master in Chambers directing a set-off of plaintiff's judgment against defendant (assigned to one Dickson) against a judgment recovered by the Accountant of the Supreme Court against plaintiff and assigned to defendant. Anglin, J., also held that an attaching order obtained by the Accountant could not be maintained by defendant.

W. E. Middleton, for defendant, contended that a set-off should be directed or the attaching order made absolute.

C. A. Moss, for Dickson, contra.

THE COURT (BOYD, C., MEREDITH, J., IDINGTON, J.) held that the judgment at the suit of the Accountant against Plumer, BleasdeLL, and Lester having been assigned (as to defendant BleasdeLL) to the applicant Boisseau, he was entitled to the benefit of the then existing and the still operative attaching order, obtained on that judgment against the

moneys recovered in this action against Boisseau at the suit of Bleasdel. The acquisition of the judgment against Bleasdel was not intended to operate as a satisfaction of the attaching order; that remained outstanding for the protection of Boisseau as against the claim of Bleasdel in this action. The principle of *Trust and Loan Co. v. Cuthbert*, 14 Gr. 440, applied, even if the assignment of the judgment at the suit of the Accountant had been as to all the defendants. By setting off the judgments the Court gives effect to the attaching order as operative and does substantial justice as between plaintiff and defendant.

Appeal allowed and order of Master restored. The appellant to have his costs of the original application. No costs of the appeals.

BRITTON, J.

OCTOBER 12TH, 1904.

TRIAL.

RANDALL v. OTTAWA ELECTRIC CO.

Negligence—Electricity—Use of Pole by Stranger—Liability—Findings of Jury—Cause of Action—Claim of Wife for Injury to Husband.

Action commenced on 25th May, 1902, and brought by Thomas E. Randall, by his next friend, and by Randall's wife, to recover damages for injuries sustained by Randall on 19th September, 1901. Randall was a linesman in the employ of defendants the Ottawa Electric Co., and was by that company sent to do some work on a pole in the city of Ottawa. In doing that work he accidentally came in contact with a live wire, was thrown to the ground, and was so seriously injured that he became insane. The action was brought against the electric company and Ahearn and Soper (Limited). At the first trial the action was dismissed as against the electric company, and the jury disagreed as to the other defendants. The case was taken to a Divisional Court, to the Court of Appeal, and to the Supreme Court of Canada (6 O. L. R. 619, 2 O. W. R. 146, 1022, 34 S. C. R. 698), with the result that a new trial was ordered as against defendants Ahearn and Soper. That trial took place at Ottawa on 22nd and 23rd September last. In answer to questions submitted the jury found that these defendants were guilty of negligence, which was the proximate cause of the injury to Randall, in leaving the tie wires uncovered and in not cutting off, close, the ends of these tie wires; and that he could not by the exercise of reasonable care have avoided the injury. Defendants Ahearn and Soper did not own the pole on which

they put their wire and as to which the jury found negligence, nor had they, so far as appeared, the consent of the owners to use it, and the electric company were not shewn to have had any express consent or authority to use that pole, but Randall, in the ordinary course of his employment, was sent to this pole to put upon it a transformer for the purpose of supplying light to the adjacent building.

A. E. Fripp, Ottawa, for plaintiffs.

W. R. Riddell, K.C., and C. Murphy, Ottawa, for defendants Ahearn and Soper.

BRITTON, J., held that, as between Randall and Ahearn and Soper, the former was not a trespasser, but was rightfully upon the pole. Ahearn and Soper must be taken to have known, in using that pole, that other persons would be just as likely to use it. It was in a central place, with large buildings near by, requiring light for illumination and for ordinary lighting. Ahearn and Soper ought so to have fastened the live wire placed by them on the pole as to render it reasonably safe for persons requiring to use it for any proper purpose connected with transmitting the current.

The jury were told that they might apportion the damages between the two plaintiffs. They assessed the damages at \$2,500, and apportioned it \$500 to the husband and \$2,000 to the wife. The wife was entitled to be supported by her husband, and she had sustained damage by being deprived of her husband's support.

Judgment for plaintiffs for \$2,500 (as apportioned by the jury) with costs, including costs of former trial and of appeal to Divisional Court, which were to abide the event.

CARTWRIGHT, MASTER.

OCTOBER 13TH, 1904.

CHAMBERS.

BRUCE v. ANCIENT ORDER OF UNITED WORKMEN.

Parties—Interpleader Issue—Who should be Plaintiff—Insurance Moneys—Security for Costs.

A policy of insurance issued by the defendants on the life of Robert Bruce was made payable to his wife Jane Bruce. He had for many years been living with the plaintiff, who was called by that name and passed for his wife and by whom he had a family. Shortly before his death he made a will by which he bequeathed the policy to another Jane Bruce, whom he described as his wife, resident in Scotland, and to his daughter Elizabeth. Plaintiff having brought this action to recover the amount of the insurance, and the legatees having

also claimed the money, the defendants obtained an order for leave to pay the money into Court, and directing the trial of an issue between plaintiff and the legatees.

Upon settling the terms of the order, the questions, who should be plaintiff in the issue, and whether the legatees should give security for costs, were raised.

W. J. Elliott, for plaintiff.

F. S. Mearns, for legatees.

THE MASTER.—Applying the decision in *Re Ancient Order of Foresters and Castner*, 14 P. R. 47, I think the legatees should be plaintiffs, as the other Jane Bruce had the policy or certificate in her possession, and would have been paid had not the legatees intervened.

Should these legatees give security for costs? I think not, for this reason: the difficulty has been caused by the act of the insured himself. It may, therefore, be assumed that the Court will give costs to both parties out of the fund or else give judgment for defendants without costs. On the analogy of will cases, the former course will be adopted, so I do not make any order for security at present.

ANGLIN, J.

OCTOBER 13TH, 1904.

WEEKLY COURT.

SLATER v. TOWN OF NIAGARA FALLS.

Interim Injunction — Comparative Convenience — Municipal Corporation—Contract.

Motion by plaintiffs to continue an interim injunction restraining defendants from entering into any contract each with the other based on the tender of defendants Barry & McMordie for the work known as "section No. 11," and, if contract already signed, from proceeding with the work.

Frank Ford, for plaintiffs.

F. C. McBurney, Niagara Falls, for defendant town corporation.

C. A. Masten, for defendants Barry & McMordie.

ANGLIN, J.—Counsel for the town corporation having declined to allow this motion to be dealt with as a motion for judgment in this action, to which course counsel for plaintiffs had assented, I dispose of it, as a motion to continue to the trial an interlocutory injunction, largely upon considerations of comparative convenience and the comparative damage which may ensue to either party from the adoption

of the courses open to me. Plaintiffs have established facts—at least by comparative proof—which render the legality of the course taken and proposed by defendants gravely doubtful. If denied the continuance of their injunction and successful at the trial in establishing their right to the relief they claim, plaintiffs might, and in all probability would, find a judgment declaratory of such rights of little or no value. The contract impugned by them might then have been in great part if not wholly executed. It seems to me better to prevent this and to defer the incurring of debts and the expenditure of money which might eventually prove to be illegal and unjustifiable, until the legality of the course proposed to be taken by defendants can be in due course determined.

Upon plaintiffs undertaking to bring this action down to trial at the ensuing sittings at Welland, the injunction will be continued until the trial. Costs reserved to trial Judge.

ANGLIN, J.

OCTOBER 14TH, 1904.

WEEKLY COURT.

BOYS' HOME v. LEWIS.

Judgment—Construction—Order to Refund Money Retained by Executors—Joint or Several Liability—Interest.

Appeals by plaintiffs and defendants the executors from report of Master at Hamilton.

The appeal of the executors was upon the question of joint or several liability to refund moneys paid to them as legatees by themselves as executors. Leave for this appeal was given by a Divisional Court, 3 O. W. R. 779, on appeal from an order of STREET, J., 3 O. W. R. 625.

W. E. Middleton, for defendants the executors.

A. M. Lewis, Hamilton, for plaintiffs.

D'Arcy Tate, Hamilton, for defendants the Officers.

ANGLIN, J.—. . . The first ground of appeal taken on behalf of plaintiffs is well founded and should be given effect to.

Upon the second ground of appeal the appellants seem to me entitled to part relief. Instead of being called upon to refund the whole sum of \$235 paid them by the executors for interest pursuant to the report dated 23rd April, 1883, plaintiffs should only be required to refund so much of that sum as represents interest upon that portion of \$5,510.57 to which, upon the new basis of distribution, they are not entitled.

Upon the third ground of appeal I am unable to give effect to the argument so ably presented by Mr. Middleton on behalf of the executors. The one-third of the residuary estate left in the hands of the executors, after they had made the payments directed by the judgment of 3rd May, 1883, they retained by virtue of a bequest thereof to "my said trustees or the survivor of them," as jointly entitled to such one-third. The subsequent division of this money between themselves in equal shares was their own act. The certificate of judgment in the Court of Appeal of 7th May, 1900, declares "that the defendants John Lewis and Robert Morgan are liable to make good and repay such portion of the sum of \$5,510.57 retained by them as their share of the residue," etc. I read this language as meaning and requiring repayment by Lewis and Morgan of that which they had wrongly retained, namely, part of the one-third of the residuary estate jointly retained by them. I find nothing inconsistent with this construction of the formal certificate in the language of any of the opinions delivered by the members of the Court of Appeal (27 A. R. 242)—even if I am at liberty to resort to such opinions to aid in construing the language of the formal certificate of the judgment of the Court, which the Court itself—or the surviving members—declined to alter (*Uffner v. Lewis*, 3 O. W. R. 306). In my opinion, this ground of appeal, therefore, fails. . . .

No costs.

OCTOBER 14TH, 1904.

C.A.

RE NORTH RENFREW PROVINCIAL ELECTION.

RE MACDONALD.

Contempt of Court—Publication of Newspaper Article—Complaint on Pending Election Petition — Prejudice — Petition not Prosecuted—Abuse of Forms of Court.

Motion by Mr. Dunlop, the respondent, to make absolute an order nisi to commit Mr. J. A. Macdonald, managing editor of the Toronto "Globe" newspaper, for contempt of Court in publishing in the newspaper on 6th May, 1904, an article commenting on matters alleged to be in question upon a petition pending against the respondent to avoid his election as member for North Renfrew in the Legislative Assembly of Ontario. The article was published and the motion made before the petition came on for trial.

The article was as follows: .

"A Celebrated Election Case.

"The extraordinary, if not unprecedented, sum admitted to have been paid by Mr. Dunlop to secure his election for North Renfrew recalls what is, perhaps, the most celebrated election case to be found in the records of the Dominion Parliament or of the Ontario law Courts. This was the petition to unseat the late Mr. John Walker for the city of London 30 years ago. The two candidates at the election had been fellow-members of the Conservative party and warm personal friends. It were bootless to inquire what caused the rift in the lute, but something moved Mr. Walker to run against Mr. Carling, and he was elected by a narrow majority. The election was contested and Mr. Walker was unseated and disqualified. In view of the fact that Mr. Dunlop admits through his official agent an expenditure of over \$7,000, it is more than interesting to note some of the features of the London case.

"The first point is that the agent of Mr. Walker admitted spending various sums paid openly to him by the respondent for legitimate purposes. The Judge who presided at the trial, the late Sir John Hagarty, summed these up at about \$2,100, adding: 'It was not strongly pressed that such a sum would, under the circumstances, be extravagant, nor am I prepared to hold that it was.' As the learned Judge was horrified to discover that the expenditure all told amounted to \$9,000, one may easily imagine what he would have thought of a 'legitimate' expenditure of \$7,000, if such a thing had come under his notice. Among the items were \$120 for livery-stable bills, \$850 for printing and advertising, \$300 for clerks and messengers, and \$700 to ward committees for 'rent of rooms, refreshments, light, vehicles, driving about, canvassing, etc.'

"The personal complicity of Mr. Walker in the illegitimate expenditure which cost him the seat and eventually brought upon him the penalty of disqualification was raised not merely during the trial, but by the presiding Judge in his analysis of the case. One of his business partners admitted paying out between \$5,000 and \$6,000, in sums varying from \$50 to \$1,500. Another \$2,000 was contributed by a member of a legal firm which did business for the respondent. It was argued strongly by the petitioner's counsel that Mr. Walker must either have known that all this money was being spent or have kept himself intentionally ignorant of it. All records of the respondent's organization and cam-

paign were destroyed or otherwise put out of the purview of the Court, and this strengthened the suspicion against him. The presiding Judge had no hesitation in avoiding the election, but as to the personal charge he gave Mr. Walker the benefit of the doubt, due to the fact that his oath was directly against evidence entirely circumstantial. However, the Court of Common Pleas, on appeal, unanimously held that he must have had some knowledge of what was done in his behalf, and pronounced the penalty of disqualification accordingly.

"What strikes one most forcibly in reading Chief Justice Hagarty's judgment is his naive expression of horror because the evidence disclosed 'an enormous amount of bribery and corruption.' The whole of the expenditure, including \$2,000 of which the legitimacy was not questioned, amounted to only \$9,000, and the net sum which brought about a state of 'wholesale corruption' was just about the sum which Mr. Dunlop's agent admits on oath to have gone for 'legitimate expenses.' It grieved the learned and amiable Chief Justice that 'a member of the legal profession should knowingly place in the hands of unscrupulous men a sum like \$6,000 to be used in debauching and corrupting a constituency.' He describes the inquiry as 'startling,' and speaks of the 'vast amount of mischief and wickedness resulting from extensive bribery.' If there are any 'unscrupulous' election workers in Mr. Dunlop's party organization, it was certainly unwise, not to say dangerous, to place in their hands any considerable part of so suspiciously large a sum as \$7,000. Judging from analogy, the inquiry in North Renfrew may be even more 'startling' than the one that made London famous for a generation."

The motion was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.

I. F. Hellmuth, K.C., for Mr. Dunlop, the applicant.

A. B. Aylesworth, K.C., for Mr. Macdonald.

GARROW, J.A., referred to and quoted from the decisions in: *In re Clements*, 46 L. J. N. S. Ch. 383; *Hunt v. Clark*, 58 L. J. N. S. Q. B. 490; *The Queen v. Payne*, [1896] 1 Q. B. 577; *In re Lincoln Election*, 2 A. R. 368: and continued:—

It will thus be seen that there is high authority for the proposition that such an application as this should only be granted where it clearly appears that the course of justice has been or is likely to be restricted or impaired to the prejudice of the applicant unless summary punishment is inflicted upon the offender. If the article is merely libellous,

or if it is even strictly a contempt of Court, but not of such a nature as to impede the course of justice, then the applicant must resort to what other remedies, if any, the law gives him, and cannot successfully invoke the summary, and as it has been called, arbitrary remedy now sought. . . .

It is not even claimed by applicant that there was an intention to interfere with the course of justice. The utmost that is urged is, that the article is calculated to interfere with a fair trial.

Is the article then, under all the circumstances, one which, really and seriously, . . . is calculated to interfere with a fair trial of the petition against the applicant? In my opinion, it clearly is not.

I am not sure that the petition itself is before us, but I will assume that it is the ordinary petition alleging corrupt practices. The trial will, therefore, take place before two Judges upon the rota, and no one will for a moment believe that their minds will be prejudiced or affected in the very slightest degree by the article, or otherwise than by the evidence adduced upon the trial.

The only remaining room for prejudice must be that the witnesses may in some way be affected. But how? I confess that I have tried in vain to imagine in what possible way or mode the witnesses either for or against the issue joined can or will be affected. There is no attempt in the article to discuss in advance the evidence to be produced; nor any suggestion of what it will or will not prove; no suggestion that all the witnesses who can testify will not do so or that they will not when called tell the truth and the whole truth, or that full effect will not be given by the Judges to the testimony when adduced.

The subject of the article, namely, the unusual amount, over \$7,000, which the applicant had expended in the election in legitimate expenses, was a matter of public and general interest, and so a legitimate subject of newspaper comment. It was in fact public property, inasmuch as the statute requires the publication of the particulars of such expenses.

The inquiry in the election petition would not necessarily involve any question about the amount or character of the expenditure for legitimate expenses. That inquiry would apply, as I assume, solely to illegitimate expenses and other corrupt acts and practices.

Prima facie, therefore, comment, however strong, upon the amount of the legitimate expenses would not necessarily

infringe upon the rule against comments upon matters which are sub judice.

The gravamen of the charge is of course the reference in the article to the notoriously corrupt London election. That was the case not of legitimate but of illegitimate and corrupt expenditure, and the comparison made by the article was therefore at least illogical, in addition to being, as in my opinion it was, unfair and unjust to Mr. Dunlop. But, however unfair or unjust, or even libellous, it may be, I remain perfectly unconvinced that its publication can possibly affect a full, free, and fair trial of the pending petition. And being of this opinion, I think the present application fails, and should be dismissed, but, under the circumstances, without costs.

MOSS, C.J.O., MACLENNAN and MACLAREN, J.J.A., concurred.

OSLER, J.A.—. . . The disposition of this motion has been unavoidably delayed, but in the meantime the petition and cross-petition have been dismissed at a so-called trial. The Court cannot avoid taking notice of the manner in which this has been done, nor of the fact that, notwithstanding the gravity of the charges alleged by each party against his opponent and his agents, no particulars of corrupt practices were delivered on either side nor any evidence offered in support of the charges.

The only course left open to the trial Judges under such circumstances was to dismiss the petition and cross-petition, which having been done, if we may take notice of what has been publicly announced, the sitting member resigned.

The whole of the proceedings on both sides were so manifestly a sham and a user of the forms of the Court for some purpose other than of the real trial of the charges, that contempt of Court is not predicable of anything reflecting upon the parties to them. *In scena non in foro res agitur*, and whether the play is damned or applauded is no concern of a court of justice.

On this ground (but on this ground only) I would dismiss the motion, and so dismissing it I would dismiss it with costs.

THE
ONTARIO WEEKLY REPORTER

(TO AND INCLUDING OCTOBER 22ND, 1904.)

VOL. IV. TORONTO, OCTOBER 27, 1904. No. 9

OCTOBER 18TH, 1904.

DIVISIONAL COURT.

MALCOLM v. BRANTFORD STREET R. W. CO.

*Way—Accumulation of Ice—Negligence of Owner of Building
—Climatic Changes—Injury to Pedestrian—Liability.*

Appeal by plaintiff from judgment of Judge of County Court of Brant dismissing action with costs. Plaintiff, while going to work in the early morning of 6th February, 1904, slipped and fell on an accumulation of snow and ice on the sidewalk alongside of defendants' car barn in the city of Brantford, and was injured. He brought this action to recover damages for his injuries.

L. F. Heyd, K.C., for plaintiff.

E. Sweet, Brantford, for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

FALCONBRIDGE, C.J.—It is unnecessary for the purposes of this decision to discuss the large and important question of the liability, under any view of the circumstances here disclosed, of defendants. The findings of fact of the County Court Judge were very clear and pointed, and were abun-

dantly sustained—even by evidence adduced by plaintiff himself. Whatever might have been the condition of the sidewalk through the winter, there was such intervention by the freezing of the night before the accident as to make the alleged default or neglect of defendants too remotely connected with the damage.

There is an able discussion of the legal effect of the emergency which sometimes arises in "our uncertain and inclement climate," and of intervening and concurring causes of damage, in *O'Keeffe v. Mayor, etc.*, of New York, 29 N. Y. App. Div. 524.

Appeal dismissed with costs.

CARTWRIGHT, MASTER.

OCTOBER 19TH, 1904.

CHAMBERS.

SHEPPARD PUBLISHING CO. v. HARKINS.

*Discovery—Examination of Defendant—Scope of—Contract
—Breach—Denial—Damages.*

Motion by plaintiffs to compel defendant to answer certain questions put to him on his examination for discovery.

W. J. Elliott, for plaintiffs.

J. G. O'Donoghue, for defendant.

THE MASTER.—The statement of claim alleges (1) an agreement by defendant to devote his whole time to the service of plaintiffs from 1889 to August, 1903; and (2) breach of said agreement "by carrying on business on his own behalf both alone and in partnership with others." Plaintiffs ask an account of such dealings, and resulting profits, and damages for breach of contract.

The statement of defence denies any such agreement, and says that, if defendant was to devote his whole time to

plaintiffs' business, he did so, and denies his having engaged in any other business on his own account.

By these pleadings two issues are distinctly raised: 1. Was there such an agreement between the parties as alleged in the statement of claim? 2. Was defendant guilty of a breach of the same? . . . Plaintiffs must prove both to entitle them to a decree.

The questions which defendant refused to answer were directed to the second point. The refusal was on the ground that plaintiffs were not entitled to an answer until they had proved the agreement.

With this I cannot agree. The rule is well laid down in *Graham v. Temperance and General Life Assee. Co.*, 16 P. R. 536, at p. 539. . . .

The application of this rule to the present case seems to me decisive of the motion, which should be granted, with costs to plaintiffs in any event. Defendant must attend at his own expense and answer the questions so far as necessary to prove the second point. But this would not extend to going into any such detail as will be proper enough on a reference as to profits and damages, nor would defendant necessarily be required to produce his books. But I am not expressing any decided opinion on this point, because defendant has positively denied having had any business dealings with others than plaintiffs during the time of his engagement with them.

Had he rested on the first issue, defendant could not have been compelled to answer, if he had proceeded as indicated by Street, J., in the case above cited, and which was adopted: see S. C., 17 P. R. 271. If this course is thought desirable, defendant can still adopt it, but it will be for him to consider whether or not it is worth while. The issue of this order may be stayed . . . to enable him to take this course.

On the limits of discovery, reference to *Bray on Discovery*, pp. 11, 30. and 31, will be found useful.

OCTOBER 21ST, 1904.

DIVISIONAL COURT.

TAYLOR v. MCCLIVE.

*Sale of Goods—Destruction on Vendor's Premises—Liability
—Damages.*

Appeal by defendant from judgment of BRITTON, J., in favour of plaintiff for the recovery of \$2 per barrel for a quantity of apples sold by defendant to plaintiff and destroyed by frost before they left defendant's premises.

The appeal was heard by BOYD, C., MEREDITH, J., ID-
INGTON, J.

C. A. Masten and F. C. McBurney, Niagara Falls, for
defendant.

W. M. German, K.C., for plaintiff.

BOYD, C.—Having read all the evidence and exhibits, I see no reason to disturb the financial result of the judgment as given by my brother Britton, and the appeal will be dismissed with costs.

It would be well to have the terms settled by the trial Judge as to the manner of delivery of the barrels from defendant to plaintiff, and this may well be done on the settling of the minutes of the formal judgment, if it has not yet been drawn up: if it has, the matter may now be spoken to before one of the Judges of the Divisional Court.

MEREDITH, J., concurred.

IDINGTON, J.—I think, for the reasons given by the learned trial Judge, that his judgment should not be disturbed. I have carefully read the evidence, and do not see how the learned Judge could have come to any other conclusion than he did in regard to all the facts bearing upon the contract and the breaches thereof.

Possibly some room exists for a difference of opinion in regard to the amount of damages. There is, however, evi-

dence upon which the assessment of damages could be fairly made upon the basis upon which the judgment rests, and I do not feel called upon to interfere therewith.

I think the appeal should be dismissed with costs.

MACMAHON, J.

OCTOBER 22ND, 1904.

WEEKLY COURT.

RE INGLIS AND CITY OF TORONTO.

*Municipal Corporations—By-law Closing up Part of Street—
Ordnance Lands—Street Laid out by Dominion of Canada
—Consent of Dominion Government—Absence of—Void
By-law—Subsequent Consent—Amending By-law.*

Motion by the John Inglis Co. (Limited), ratepayers of the city of Toronto, for an order quashing by-law No. 4420 passed by the municipal council on 26th September, 1904, being a by-law to provide for the closing of Strachan avenue and conveying the same to the Massey-Harris Co. (Limited), on the following grounds: (1) That the corporation had no power to pass the by-law because Strachan avenue, being a public street over which the corporation had assumed jurisdiction, was laid out by a plan which included the property of the applicants, whose predecessors in title purchased according to that plan, and who had not consented to the proposed alteration. (2) Because the by-law was bad upon its face in that it did not recite the consent of the Government of the Dominion of Canada, as provided by the Consolidated Municipal Act, 3 Edw. VII. ch. 19, sec. 628, the street having been laid out by His Majesty's Ordinance. (3) That the by-law provided for a conveyance by way of free gift to a private corporation, and was not a by-law in the public interest, but solely in the interest of the private corporation.

H. S. Osler, K.C., for the applicants.

J. S. Fullerton, K.C., for the city corporation.

G. H. Watson, K.C., for the Massey-Harris Co.

MACMAHON, J.—Strachan avenue is 80 feet wide, and on 13th June, 1904, the Massey-Harris Co. wrote to the city

council setting forth that they had secured options on a number of lots of land on the east side of Strachan avenue, having a frontage thereon of 400 feet, and applying to be allowed to place a building . . . on the said 400 feet, in connection with their works, 14 feet west of the easterly street line of Strachan avenue. The company represented that the building proposed . . . would enable them to increase the output of their Toronto factory by one-fifth, which would mean the employment of 250 additional workmen.

The John Inglis Co. carry on business as manufacturers of engines and boilers to the south of the tracks of the Grand Trunk and other railways, and 630 feet south of the building proposed to be erected by the Massey-Harris Co., and they on 11th July wrote the city council protesting against the application of the Massey-Harris Co. being granted.

The city council, on 26th September, passed by-law 4420, which recites the application of the Massey-Harris Co., and that they are the owners of the land on each side of the avenue, and that the committee of the works department had recommended that the concession asked for by the company be granted; and then enacts "that . . . all that part of Strachan avenue bounded on the east by the present easterly limit of Strachan avenue, on the north by the present southerly limit of King street, on the west by a line drawn parallel to the easterly limit of Strachan avenue and distant 14 feet westerly therefrom, and on the south by the northerly limit of Wellington avenue," shall be stopped up and closed, and that the same be conveyed by the said corporation to the Massey-Harris Co.

After the passing of the by-law it was discovered that to render it valid the consent of the Dominion Government was required, and such consent was given by an order in council dated 6th October, 1904, and on 10th October the city council passed by-law 4428 amending by-law 4420 by inserting as a third recital the following: "And whereas the Government of the Dominion of Canada has consented to the passing of this by-law so far as it authorizes the lessening of the width of Strachan avenue by a distance of 14 feet on the easterly side thereof."

Before the by-law was amended, and on 1st October, this motion was launched. . . .

By the Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 591, authority is given to the councils of counties, townships.

cities, towns, and villages to pass by-laws (sub-sec. 12) "for granting aid by way of bonus for the promotion of manufactures . . . either by gift or loan . . . as the municipality may deem expedient." And sec. 591a provides that "bonus" . . . shall mean and include . . . "(d) the closing up, or opening, widening, paving, or improving of any street . . . by a corporation for the particular use or benefit of a manufacturing industry."

By an amendment made to the Municipal Act in 1904. by 4 Edw. VII. ch. 22, sec. 26, the following was added to sec. 591a at the end thereof: "Notwithstanding anything contained in this section or in section 591, the council of any municipality may pass by-laws for closing of any road, street . . . any portion thereof, and for conveying the same to any person for the particular use or benefit of any manufacturing industry, and it shall not be necessary to submit such by-law to the electors or to obtain their assent thereto where the passing of such by-law does not involve expense to such municipality; provided that the council passing such by-law shall comply with the general provisions of this Act as to notice, compensation to persons affected, and other matters with respect to by-laws for the closing up of any public road or highway."

All expenses in connection with the passing of the by-law were paid by the Massey-Harris Co., and the provisions of the Act in respect to notice, etc., were complied with.

The land through which Strachan avenue is laid out was originally Ordnance land. And in 1856 the Act 19 Vict. ch. 45 was passed, intituled "An Act for transferring to one of Her Majesty's Secretaries of State the powers and estates and property therein described now vested in the principal officers of Her Majesty's Ordnance, and for vesting other parts of the Ordnance estates and property therein described in Her Majesty the Queen for the benefit, use, and purpose of the Province."

Two schedules are annexed to the Act, the first one being the schedule of military lands in Canada to be vested in one of Her Majesty's principal Secretaries of State; the second one being "the schedule of military properties in Canada proposed to be transferred to the Provincial Government." The property in Toronto transferred to the Provincial Government is 502 acres, 2 roods, and 1 perch: see R. S. C. ch. 24.

that the pastor, as the housekeeper in the house of God, refuse the offender the Holy Communion, and should his conduct improve to admit him again to the Lord's Supper. But such as live in open sin and disgrace the trustees shall have the right to exclude from membership. Any one who is excluded from the congregation loses all rights to the property of the church, as also the right to participate in the Holy Communion or as a witness at Baptism. Such rights all those who fall away from the church lose."

At the time of the disruption there were attacks against the pastor of St. Peter's, in which plaintiff took part, saying that he did not know how any member of the congregation could stay under such a minister. But on 1st May he "took all that back," as he considered he had done wrong to the pastor, who was upheld by a large majority of the congregation.

On 2nd May, when plaintiff resigned the treasurership, there was at his credit in a bank, as treasurer of St. Peter's church, \$8.01, for which he gave a cheque payable to the new treasurer. On the same day one of the trustees deposited to the credit of St. Peter's church \$181.73, which sum was withdrawn by plaintiff, by cheque dated 6th June, 1904, in his own favour, and deposited by him in his private account. The discovery of the withdrawal was made about 6th July. Plaintiff was threatened with an action, and on 7th July paid over the money to the new treasurer, who said he did not think plaintiff intended to keep the money, but only to annoy and antagonize the congregation.

The trustees of the church called a meeting on 25th July, at which a resolution was passed expelling plaintiff from membership in the church, of which defendant Bornhold, as secretary, notified plaintiff on 4th August. Plaintiff was not notified of the meeting, nor made aware of the intention to propose a resolution for his expulsion.

This action was brought to restrain defendants from giving effect to the resolution and for a declaration of plaintiff's rights, etc.

The statement of defence alleged that plaintiff had voluntarily ceased to be a member of St. Peter's church, and was not a member at the time it was alleged that he was expelled, but had openly and notoriously allied himself with the seceding congregation, and had advised and persuaded others to

do the same; also that plaintiff never had any right of property in the church, the pews in which were free.

E. P. Clement, K.C., for plaintiff.

A. Millar, K.C., for defendants.

MACMAHON, J. (after stating the facts):—"The members of St. Peter's church formed a voluntary religious association, and having by its constitution provided a tribunal for the determination of the status of any member of the church, the question is, will the civil court, after an adjudication by the domestic tribunal which deprived plaintiff of his membership, investigate the legality or regularity of the proceedings by which he is affected?"

Plaintiff's subscriptions to the church and parsonage were voluntary. His civil rights were, therefore, not affected by the resolution of the trustees expelling him from membership.

Although plaintiff held the offices of elder, trustee, and treasurer in the church, these were all honorary positions, no emoluments being attached to any of them; and he had resigned them all prior to the resolution of the trustees expelling him. And, as said . . . in *Dunnet v. Forneri*, 25 Gr. at p. 218, "the position of a member of the church and the right to participate in the ordinances of the church are purely ecclesiastical," and it was held in that case that the Court had no jurisdiction to interfere. . . .

[*Forbes v. Eden*, L. R. 1 Sc. App. 568, *Watson v. Ferris*, 45 Miss. 18, *Bouldin v. Alexander*, 15 Wall. (U. S.) 131, *Long v. Bishop of Capetown*, 1 Moo. P. C. N. S. 411, 461, referred to.]

As plaintiff had been one of those principally concerned with the disruption of St. Peter's church, and had advised members of the congregation not to attend the church, and as he for three months had ceased attending that church and attended St. Matthew's church, the trustees of St. Peter's concluded he had fallen away from or abandoned the church, and therefore passed the resolution expelling him. It was not necessary that the trustees should have passed a resolution expelling him, as the same result would have been achieved by directing that his name be removed from the roll of membership because he had "fallen away from the church"—which is the ground, according to the statement of defence, on which the resolution for expulsion was passed—

which was abundantly evidenced by his conduct previous to 1st May in assisting in the disruption of the congregation, and by ceasing to worship in that church and worshipping in another church along with those formerly composing a part of the congregation of St. Peter's church.

I thought during the trial, and still think, that the fair course for the trustees to have pursued was to give notice to plaintiff of their intended meeting and the nature of the resolution it was proposed to submit; but, for the reasons stated, that course was not obligatory. Had it been obligatory, and had the trustees been enjoined from proceeding further on the resolution, they could have called another meeting, giving plaintiff notice to attend; and, from the feeling which it was manifest during the trial had been engendered in the minds of the trustees—doubtless participated in by the congregation—by reason of the conduct of plaintiff already referred to, there is no doubt that another resolution in like terms . . . would be passed; so that, if he were entitled to the injunction asked, it would be of no real benefit to him, even had he an honest desire to continue a member of St. Peter's church—which I very much doubt.

The action must be dismissed with costs.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING OCTOBER 29TH, 1904.)

VOL. IV. TORONTO, NOVEMBER 3, 1904.

No. 10

ANGLIN, J.

OCTOBER 25TH, 1904.

CHAMBERS.

RE WRIGHTON.

*Life Insurance—Preferred Beneficiary—Widow—Declaration
by Will—Claims of Creditors.*

Motion by executors under Rule 938 to determine the respective rights of the widow and the creditors of W. F. R. Wrighton, deceased, in regard to the proceeds of two policies of insurance upon his life, aggregating \$3,000. These policies were in force when the deceased made his will. Upon their faces they were made payable to his personal representatives. The will contained this provision: "I devise, give, and bequeath to my dear wife Amelia Wrighton, her heirs and assigns, absolutely, all my real and personal estate and effects of every nature and description whatsoever and wheresoever situate and being . . . and including therein any and all policy and policies of life and other assurance . . . for the sole use and benefit of herself and of my dear children as well as for their maintenance, education, and training and advancement in life during minority, hereby giving unto my said dear wife full control and absolute disposal of the same in her discretion for the purpose aforesaid, subject to the payment of said debts and expenses and of all other proper and legal expenses and charges." In an earlier clause the testator directed his executors to pay his just debts and funeral and testamentary expenses out of his personal estate and cash on hand.

A. Weir, Sarnia, for the executors.

C. A. Moss, for the widow, contended that she was entitled as a preferred beneficiary to the insurance moneys in

question, to the exclusion of any claim thereupon of her late husband's creditors.

W. E. Middleton, for creditors, contra.

ANGLIN, J.—The contention of the widow cannot prevail. The very instrument conferring title upon the widow makes that title subject to the payment of the debts of the testator. The insurance moneys are in the gift itself blended with and treated as forming part of the general estate out of which debts are expressly directed to be paid. The testator has unmistakably expressed his intention that these insurance moneys should remain part of his general estate available to meet the claims of his creditors.

Costs of all parties out of the fund.

ANGLIN, J.

OCTOBER 25TH, 1904.

WEEKLY COURT.

PLENDERLEITH v. PARSONS.

Costs—Mortgage—Action for Redemption—Opposition to—Former Foreclosure Proceedings.

Motion by plaintiff for judgment on the pleadings in an action for redemption of mortgaged lands.

T. Hislop, for plaintiff.

B. Morton Jones, for defendants, conceded that plaintiff was entitled to judgment as prayed, but contended that in its discretion the Court should withhold the costs of the action; that plaintiff might, at much smaller expense, have obtained full redress by a petition to open up former foreclosure proceedings, and should not therefore be allowed the costs of a new action for redemption.

ANGLIN, J.—The major part of the costs of the action have been occasioned by defendants' mistaken course in opposing plaintiff's claim which they now yield. Had defendants promptly acceded to plaintiff's demand, the costs would have been, at most, trifling.

The usual judgment for redemption will therefore be entered. The costs of the action down to and inclusive of judgment will be deducted from the mortgage claim of de-

fendants, by the Master in fixing the amount at which plaintiff shall be entitled to redeem. The mortgagees will have no costs of the former foreclosure proceedings. In other respects the usual practice as to costs in such actions as the present will prevail.

Reference to the Master in Ordinary.

ANGLIN, J.

OCTOBER 26TH, 1904.

CHAMBERS.

RE BRAIN.

*Will—Executors—Power to Carry on Business of Testator—
Sale of Business—Lease of Premises.*

Motion by executors for order under Rule 938 giving directions as to disposal of estate of testator.

B. F. Justin, Brampton, for executors.

W. S. Morphy, Brampton, for J. C. F. Brain.

F. W. Harcourt, for infant.

ANGLIN, J.—In the absence of any provision authorizing the carrying on of the testator's business by his personal representatives, no order can be made sanctioning that course. The will confers no power of sale on the executors and executrix. Under these circumstances, they may take whichever one of two courses they deem most advantageous for the estate. They may sell the chattels and lease the brewery premises until the period fixed for division of the estate, or they may sell the business—chattels and goodwill—as a going concern, giving to the purchaser a lease of the premises until the period of division fixed by the will, with an agreement for sale, if deemed advisable, subject to the approval of the beneficiaries when the infant attains her majority. For this latter purpose the executrix and executors may carry on the business, but only for such time as may be necessary and proper to effect a reasonably advantageous sale. Having regard to the nature of the business, the sale should be soon.

Costs to all parties out of estate.

MACMAHON, J.

OCTOBER 26TH, 1904.

CHAMBERS.

RE BROOKS v. HUBBARD.

*Division Courts—Removal of Plaintiff into High Court—
Question Involved—Paternity of Illegitimate Child.*

Motion by defendant for an order of certiorari to remove a plaintiff from the 1st Division Court in the county of Dufferin into the High Court.

Plaintiff's claim was to recover \$62 for the maintenance and support of an illegitimate child of which defendant was alleged to be the father.

Plaintiff was the mother of the child. Defendant denied his paternity.

Section 82 of the Division Courts Act provides that in case the debt or damages claimed in an action brought in a Division Court amounts to \$40 and upwards, and in case it appears to any of the Judges of the High Court that the case is a fit one to be tried in the High Court, and in case a Judge thereof grants leave for that purpose, the action may by order of certiorari be removed from the Division Court into the High Court.

The main ground upon which defendant sought the removal of the action was, that the liability with which plaintiff sought to charge him existed as a continuing liability which in time would involve him in a sum far beyond the jurisdiction of a Division Court.

J. E. Jones, for defendant.

D. L. McCarthy, for plaintiff.

MACMAHON, J.—The only question in the case is one of fact, namely: Is the defendant the father of the child? No question of law can arise on the trial, and it is only where difficult questions of law are likely to arise that certiorari will lie to remove an action: see *Rees v. Williams*, 7 Ex. 51; *Longbottom v. Longbottom*, 8 Ex. 203; and other cases referred to in *Bicknell & Seager's Division Courts Act*, 2nd ed., p. 128.

The motion must be dismissed with costs.

MACMAHON, J.

OCTOBER 26TH, 1904.

WEEKLY COURT.

RE CANADA WOOLLEN MILLS, LIMITED.

Company—Winding-up—Sale of Assets—Acceptance of Tender of Inspector under Act—Powers of Referee—Sale not Recommended by Liquidator.

Appeal by W. T. Benson & Co., creditors of the Canada Woollen Mills, Limited, a company being wound up under the Dominion Act, from the certificate of James S. Cartwright, official referee, of his acceptance of an offer made by W. D. Long to purchase the assets of the company, upon the following grounds: (1) That the sale was not made by the liquidator of the company, as the statute requires, nor did he accept the offer of Long. (2) That Long was an inspector appointed under the Act, and could not purchase. (3) That the sale was made improvidently and at an under-value, and not in accordance with the practice of the Court. (4) That the offer by Long and the acceptance by the referee did not constitute a definite bargain capable of being enforced, and there was no written evidence of the bargain, and its terms were not settled.

W. H. Blake, K.C., for appellants.

I. F. Hellmuth, K.C., for W. D. Long.

G. H. D. Lee, for the Dominion Bank and certain other creditors supporting the sale.

R. S. Cassels, for the liquidator.

MACMAHON, J.—. . . Mr. Long was one of the six inspectors in the liquidation, and was such when he purchased the assets of the estate for \$253,000. . . .

[Reference to Segsworth v. Anderson, 23 O. R. 573, 21 A. R. 242, 24 S. C. R. 699; Gantonguay v. Savoie, 29 S. C. R. 613; Ex p. James, 8 Ves. 345.]

Now, I find from the correspondence put in, that Mr. Long, having purchased on 22nd September, two days afterwards—on the 24th—telegraphed to George Moore at Waterloo offering the Waterloo mills for “\$54,000, including all supplies in mill,” and saying, “I will take five thousand with you, Seagram, Randall, and friends. Payments made easy. Wire me reply. Sold both Carleton mills.” He sold the Carleton Place mills at \$50,000.

He also, on the 24th, wrote the Penman Manufacturing Co. of Paris, in which he is a large shareholder and director, regarding the mills at Hespeler, giving a list of mill supplies on hand, amounting to \$16,297, and then stating: "As a director of the Penman Co., I would recommend that you offer \$130,000 for the mills, houses, lands, and everything connected with the place, on one year's time without interest. I could hold the deed and indorse your paper. If accepted, I would suggest putting a man in charge who is a carder and spinner and let him do all the work you can give him. . . . Next spring, if it is decided that you do not want them connected with your present mills, we could sell them, or, may be, get up a separate company to run them. I feel sure these mills will be worth double the day after the Penman Co. buy them, and I do not like to let these mills get into other hands until the Penman Co. has plenty of time to consider. The risk is so small in buying as I suggest. I think you should seriously consider the proposition."

There was at the time that Mr. Long made his offer \$37,000 cash belonging to the estate in the bank, which was included in the assets sold; there were manufactured goods which Mr. Long immediately sold for \$17,000; there were supplies which were necessary for the running of the mills, amounting to \$26,000, but which were carried into account at \$13,000; and bills receivable amounting to about \$80,000, which were carried in at \$75,000, as it was considered that they were good for that sum; then there was \$4,800, rebate on insurance: these several items amounted to \$146,500.

The Penman Co. had these mills under option at \$125,000.

It is manifest that Mr. Long was in a position to know of people who were likely to be purchasers of the mills which he acquired, and the facility with which he was able to dispose of some of the properties shews that when the mills were being sold separately there was no great difficulty in disposing of them, and he seems to have been possessed of a knowledge as to intending purchasers which, if as inspector he had communicated it to the liquidator, would have been of very great value to the estate.

As to the point arising under sec. 31 of the Act. Upon the appointment of a liquidator, the estate of the insolvent

company became vested in him, and the duty devolved on him of receiving offers or tenders for the sale of the estate, and "he may, with the approval of the Court, and upon such previous notice to the creditors, shareholders, or members as the Court orders, sell the real, personal, heritable, and moveable property, effects, and choses in action, by public auction or private contract, and transfer the whole thereof to any person or company, or sell the same in parcels."

It is, I think, reasonably clear that it is upon the liquidator, as one of the officers of the Court, that the duty is cast of recommending—perhaps with the sanction of the inspectors—to the Court that the offer of a particular tenderer for the assets of the estate be accepted or rejected. The liquidator is to dispose of the estate with the sanction of the Court; but the Court cannot dispose of the estate without the sanction of the liquidator.

This, I think, is apparent from the interpretation put upon sec. 33, which provides that the liquidator may, with the approval of the Court, compromise all calls and liabilities to calls, debts, and liabilities, and all claims that are present or future, certain or contingent, etc. . . .

[Reference to sec. 100 of the English Winding-up Act; *In re East of England Banking Co.*, L. R. 7 Ch. 309; *In re Sun Lithographing Co.*, 24 O. R. 200.]

I therefore reach the conclusion that the referee could not dispose of the assets of the estate without the assent of the liquidator.

The offer made by Mr. Long to the learned referee of \$253,000 was not sanctioned by Mr. Davidson, the liquidator. He thought that a better offer could be had, having regard to the prices at which the mills were purchased by the insolvent company (between \$600,000 and \$700,000), and he considered the sacrifice would be too great if Mr. Long's offer was accepted. The opinion he entertained has been fully justified by the celerity with which Mr. Long was able to dispose of some of the mills and other assets and the prices realized therefor. The probable profit to Mr. Long would, if the sale were carried out, be about \$125,000.

The sale must be set aside, and Mr. Long must account to the liquidator for the profits arising from any portion of the assets sold by him.

The costs of the appeal must be paid by Mr. Long.

OCTOBER 26TH, 1904.

DIVISIONAL COURT.

FABIAN v. SMALLPIECE.

Negligence—Setting out Fire—Damage to Property—Causal Connection—Findings of Jury.

Appeal by defendant from judgment of MACMAHON, J., in favour of plaintiff, upon the findings of a jury, for \$200 damages and costs in an action for negligence in setting out fire.

W. R. White, K.C., for defendant.

C. A. Moss, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), was delivered by

FALCONBRIDGE, C.J.—The law relating to setting out fire has been fully defined by a line of cases from 1846 (Dean v. Carty, 2 U. C. R. 448) to the present day, the fullest modern exposition being in Furlong v. Carroll, 7 A. R. 145.

This case could not have been withdrawn from the jury, and it went to them with a charge to which no exception was, or could reasonably have been, taken.

The answer to the 3rd question was faintly and unsuccessfully attacked, and the only point for consideration was as to the establishment of a causal connection between the fire kindled by defendant and the damage to plaintiff's property. This was placed beyond the range of mere speculation or conjecture by evidence that fire had been known to jump over an intervening space as large as that which was said to have existed here. No other reasonable theory of the cause of fire on defendant's premises was put forward.

These matters and the high wind which arose on the 30th were all placed before the jury.

As John Wilson, J., said in Wilkins v. Row, 15 C. P. 326, "the facts of the case were of a character familiar to the occupations of the jury, about which they were not likely to form an erroneous judgment."

Certainly they meted out scant justice to plaintiff in the matter of damages, and I question whether the grant of a

new trial (if we were to that extent dissatisfied with the result) would not prove *damnosa hereditas* to defendant.

Appeal dismissed with costs.

GARROW, J.A.

OCTOBER 26TH, 1904.

C.A.-CHAMBERS.

RANDALL v. OTTAWA ELECTRIC CO.

Appeal to Court of Appeal—Special Leave—Case Tried with Jury—4 Edw. VII. ch. 11, sec. 76 (a).

Motion by defendants Ahearn and Soper, Limited, for leave to appeal to the Court of Appeal direct from the judgment at the trial before BRITTON, J., and a jury in favour of plaintiffs for \$2,500: ante 240.

W. R. Riddell, K.C., for applicants.

H. M. Mowat, K.C., for plaintiffs.

GARROW, J.A.—The application is based upon sec. 76 (a) of the Judicature Act, as amended by 4 Edw. VII. ch. 11, which reads as follows: "In any case in which an appeal would lie from the Court of Appeal to the Supreme Court of Canada, any party may by consent, or by leave of the Court of Appeal or a Judge thereof, appeal to the Court of Appeal from a judgment, order, or decision of a Judge in Court at the trial or otherwise, or may apply for a new trial of the action."

It is not and could not be seriously contended that the case is not of sufficient importance and difficulty, in addition to the amount of the judgment, to justify an appeal.

But it is said that the section quoted does not apply to the case of a trial with a jury, but only to trials by a Judge without a jury.

Under sec. 67 (1) (d), as amended by the same statute, application for a new trial in the High Court, when the action has been tried with a jury, is to be made to a Divisional Court. And under sec. 76 (1) (b), as amended by the same statute, where the matter in controversy is of the sum or value of \$1,000, exclusive of costs, an appeal lies to the Court of Appeal from the judgment of a Divisional Court.

So that in the present instance, the judgment being for \$2,500, an appeal would lie to the Court of Appeal by either party from the judgment of a Divisional Court granting or refusing a new trial.

The plain object, and a laudable one it appears to me, of the new section 76 (a) was to avoid as far as possible the double appeal, first to a Divisional Court and then to the Court of Appeal, in cases likely from their nature and the amount involved to proceed to the Court of last resort.

And to this end liberty is given by the section to the parties themselves to consent, and thus simply to confer the necessary jurisdiction to hear the appeal.

The judgment at or following upon the trial where the issues of fact are tried by a jury is, in my opinion, the "judgment, order, or decision" of the Judge, within the meaning of the section.

The language is certainly wide enough to cover both jury and non-jury trials without any straining, and its construction should, I think, be in the direction of liberality rather than the reverse, in order to avoid, as far as possible, unnecessary expense.

The application is granted. Costs in the cause.

CARTWRIGHT, MASTER.

OCTOBER 27TH, 1904.

CHAMBERS.

CRAMP STEEL CO v. CURRIE.

Parties—Company—Shareholders—Use of Corporate Name in Litigation.

Motion on behalf of plaintiffs, an incorporated company, to set aside the writ of summons issued in their name, on the ground that the company had not authorized the use of their name.

W. E. Middleton, for plaintiffs.

F. Arnoldi, K.C., for solicitors.

THE MASTER.—In this action the company are the sole plaintiffs. The writ issued 6th October, 1904, and was specially indorsed. The claim is to have certain proceed-

ings of the company set aside and an injunction to prevent certain other things being done which it is alleged are highly prejudicial to the company's interests. . . .

The whole question as to the proper form of action . . . is considered fully in *International Wrecking Co. v. Murphy*, 12 P. R. 423, and cases cited. .

No doubt, *prima facie* the company is the proper plaintiff. But where it is alleged, as here, that the company is being improperly controlled by defendants or some of them, the only course to adopt is to strike out the name of the company as plaintiff and add it as defendant, with leave to Angus Smith or any other shareholders to be made plaintiffs and to serve such statement of claim as they may be advised. Costs of this motion to the company in any event. If such amendment is not made within a week, the writ will be set aside with costs as in *Scribner v. Parcels*, 20 O. R. 554, at p. 563. It is admitted that the company gave no authority for the action, and the indorsement shews that it would be idle to direct a meeting to ascertain the wishes of the shareholders, as one of the first grounds of complaint is that defendants or some of them are able "to outvote all the other shareholders" in the present condition of the company.

BRITTON, J.

OCTOBER 27TH, 1904.

TRIAL.

BELLEISLE v. TOWN OF HAWKESBURY.

Way—Non-repair—Injury to Person—Negligence—Condition of Sidewalk during Construction Work.

Action for damages for injuries to plaintiff by reason, as alleged, of defective condition of sidewalk in town of Hawkesbury.

J. Maxwell, L'Original, for plaintiff.

D. B. Maclellannan, K.C., and H. W. Lawlor, Hawkesbury, for defendants.

BRITTON, J.—The facts, undisputed, or as found by me, are as follows.

Plaintiff is a barber and grocer doing business on the north side of Main street in Hawkesbury. The municipal

corporation were doing extensive repairs to that street. These repairs included taking up the old board walk on the north side, raising the level of the street, and putting down a new walk on the higher level. The work was being done by a contractor, but under the supervision and direction of the town.

On Saturday 18th July, 1903, the new walk had been completed to a point in front of plaintiff's shop. . . . The workmen were taken away from this work to do something, said to be urgent, in another part of the town, and these men were away part of Saturday and all of Monday 20th July. The walk was to be and now is 4 planks wide, laid lengthwise, side by side, and resting upon sleepers laid with ends to the street. The ends of only each alternate plank rested upon the same sleeper. This was done "to break joints," as a more firm and better walk can in that way be made.

The work left in an unfinished state at the time of the accident consisted of the two alternate planks at the easterly end of the walk under construction, with the two alternate open spaces between. Plaintiff knew on Saturday and Sunday of this unfinished work, knew generally of its condition, and did not in any way object to what was being done or left undone.

On Monday 20th July goods of plaintiff were carted to his store, and he rode with the load on the cart. I find that plaintiff's own account of where and how he alighted from the cart must be accepted as correct: . . . When the cart stopped at the southern edge of the walk, in front or nearly in front of plaintiff's premises, he jumped or sprang or stepped from the cart, not in any reckless or careless way, but as an ordinarily prudent man would do, and his left foot landed upon the plank of the walk properly placed, and his right foot upon the sleeper beyond the easterly end of the next plank. His right foot slipped off this sleeper and went to the ground, a depth of 7 or 8 inches. This caused plaintiff to fall to the right and backwards, and by the fall one bone of the right leg was broken. This happened about 7.30 in the evening, when it was quite light and when everything there could be plainly seen by plaintiff.

The allegation of plaintiff is, that defendants failed to properly construct, maintain, and keep in repair the portion of the sidewalk in front of plaintiff's place of business.

Defendants, so far as they had constructed the new sidewalk, did so in a proper manner. It was good and free from

defect so far as it had been completed. Defendants were not negligently allowing the walk to get and to remain out of repair, but were complying with the statute by improving the condition of the street.

The distance from the plank or top of sleeper to the ground was not too great. It was not, in my opinion, in any way negligent to have the planking the distance of 7 or 8 inches above ground at that place. I do not think that the sidewalk, as left on the Saturday evening and as it was when the accident occurred, was unsafe for persons lawfully using it. . . . It could not fairly and reasonably be considered dangerous or a trap to persons having ordinary eyesight and going upon it in daylight.

As plaintiff knew all about its condition, a printed notice was not required.

Plaintiff was willing to use the walk as it was for access to his own premises. Had the accident happened in the dark to a foot passenger, the necessity of a light or barrier might have to be considered.

I do not think it was the duty of defendants to put barriers upon the outer or southern edge to prevent persons walking across from the street to the houses or shops on the north side. This is what plaintiff attempted to do.

I find that defendants were not guilty of negligence in leaving the work as it was when the accident happened. The accident was a mere misadventure. Plaintiff must have known at the time he jumped or stepped from the cart, the exact condition of the walk. . . . In some way, unknown to plaintiff, by mere accident, plaintiff's right foot slipped from the sleeper, causing him to fall and to fracture his leg. Neither the hole nor the sleeper was dangerous or unsafe to plaintiff or the public. If it is contended that defendants performed needed repairs in a negligent manner so as to make them liable, I find against that contention: see *Macdonald v. Township of Yarmouth*, 29 O. R. 259.

The action must be dismissed, and with costs, if defendants ask for costs.

In view of the case going further, and of the possibility of the Court finding that there is upon the evidence liability on the part of defendants, I find that plaintiff was not guilty of any contributory negligence; and, if plaintiff is entitled to recover at all, he should recover \$200 damages with costs on the County Court scale without any set-off of costs by defendants.

OCTOBER 27TH, 1904.

DIVISIONAL COURT.

CRAIG v. MCKAY.

Bankruptcy and Insolvency—Assignment for Benefit of Creditors—Previous Mortgage by Insolvent—Preference—Purchase of Mortgaged Land by Assignee—Ignorance of Existence of Mortgage—Subsequent Action to Set aside—Status of Assignee—Statutory Presumption—New Trial.

Appeal by plaintiff from judgment of BRITTON, J., dismissing action brought by the assignee for the benefit of creditors of one Vandecar to set aside a mortgage upon land, made by Vandecar to defendants, as preferential and void under the Assignments Act. Plaintiff, as assignee, conveyed the land in 1897 to one Rose, and Rose conveyed to plaintiff, who then knew nothing of defendants' mortgage. Plaintiff paid \$600, which was divided among the creditors. The trial Judge (at a trial without a jury) held that plaintiff could not maintain the action, and dismissed it without hearing evidence for the defence.

The appeal was heard by BOYD, C., MEREDITH, J., IDINGTON, J.

F. Arnoldi, K.C., and P. McDonald, Woodstock, for plaintiff.

G. H. Watson, K.C., for defendants.

BOYD, C.—Plaintiff is assignee in law of the Vandecar estate and sues in that character to vacate a mortgage to the defendants for \$250 made by the insolvent, a few days before the assignment, upon a farm already mortgaged to the Huron and Erie Loan Co. for \$3,600. The defence is, that the farm was sold by the assignee and purchased on his behalf for \$4,200 in March, 1897, and is now vested in him as owner. The learned Judge has ruled that such is his legal position, and declines to regard his status as sufficient to justify the maintenance of this action. No doubt, qua owner, he could not attack the prior registered mortgage—qua assignee for creditors he can impeach the mortgage under the statute then in force, 54 Vict. ch. 20, sec. 2, sub-sec. 2 (b). The mortgage for \$250 was to secure a bill of costs of the mortgagees; it was made on 15th October, 1896, but it was

not registered until 10th February, 1897. The assignment for creditors was executed on 21st October, 1896. The assets were all realized, and distribution of a dividend of 7 per cent. was made about 12th July, 1897. The farm was sold, subject to the first mortgage, on 13th March, 1897, and the conveyance taken, through a nominal purchaser, to plaintiff in August, 1897. After providing for the first mortgage, there came out of the purchase money a balance of \$600, which was paid by plaintiff and distributed among the creditors. Defendants filed their claim as creditors (but without disclosing the mortgage) in December, 1896, and received their share of the dividend in June, 1897.

It is proved that plaintiff had no notice or knowledge of the \$250 mortgage till October, 1897, after the estate had been wound up and distributed.

Plaintiff took possession of the farm with knowledge of the creditors of the purchase by him, and so remained until disturbed by notice of the exercise of the power of sale in defendants' mortgage, on 10th May, 1903, and then this action was begun to invalidate the instrument or to stay proceedings thereon.

The evidence, so far as given, was for plaintiff, and it disclosed sufficient to justify a declaration that the mortgage was null and void ab initio as against creditors. We were pressed to hold that it was invalid under the clause of the statute referred to, by virtue of an irrebuttable presumption.

I am not disposed to go to that length, having regard to the confused and conflicting state of judicial opinion, and in the absence of any determinative decision on the very point, binding upon this Divisional Court. . . . But it is not necessary to deal with this point of law, as I think the defendants should be allowed to exhaust their evidence upon the defence, if they wish to do so, upon a further hearing of the case.

I cannot affirm the ruling that plaintiff has no status to sue. He comes into Court as assignee, and he offers to account for the land purchased by him on the usual footing of trusteeship for the body of creditors, and this relief may be worked out by a reference.

The reason for entertaining jurisdiction is, that the distribution of the estate as settled in 1897 is being disturbed by the assertion of defendants' rights under the mortgage. The existence of that mortgage should have been divulged,

and would thereupon have been dealt with before any distribution was made. Defendants are to blame for the delay and concealment. The attempt now made is to get paid their claim in full—by virtue of a security which the statute declares to be an unjust preference.

To procure equitable adjustment in the interests of all creditors, plaintiff is the proper person to sue as assignee. The situation is not different from what would have arisen had the purchaser of the farm been a stranger to the insolvent estate. Had a stranger bought, he would, in the circumstances disclosed, have been obliged to pay defendants' mortgage, but would have fallen back for relief upon the assignee, to be recouped the amount of the mortgage; and the assignee would then have had recourse to the body of creditors to repay the dividends received by them—such proportion as would make good the amount he had overpaid in the distribution of the supposed assets. This would be the proper result of the equities between a stranger who purchased and the assignee, the vendor, having regard to the substance of the transaction divested from any special modifications that might result from the method of conveyancing.

This suit is or may be properly constituted so as finally to determine the validity of defendants' mortgage and to shape subsequent relief in accordance with whatever the result may be.

If defendants pay costs occasioned by the former partial trial and this appeal, the case will go down to be tried out on all the evidence that may be adduced, and subsequent costs will be dealt with on the new trial.

If defendants decline this proposition, the judgment will be to vacate defendants' mortgage, with costs of action and appeal, and to direct the assignee to sell the farm at its present advanced value, and to account for and properly distribute all gains received by him as part of the estate since his purchase. He should undertake to do this forthwith, and with leave to defendants or any other creditor to apply if the administration out of Court is not deemed satisfactory. As against creditors' claims the Statute of Limitations cannot be set up, nor should it be.

MEREDITH, J., gave reasons in writing for the same conclusion.

IDINGTON, J., dissented, giving reasons in writing.

IDINGTON, J.

OCTOBER 28TH, 1904.

CHAMBERS.

SHEPPARD PUBLISHING CO. v. HARKINS.

*Discovery—Examination of Defendant—Scope of—Contract
—Breach—Denial—Damages.*

Appeal by defendant from order of Master in Chambers, ante 250, requiring defendant to attend for further examination for discovery.

W. T. J. Lee, for defendant.

W. J. Elliott, for plaintiffs.

IDINGTON, J., dismissed the appeal with costs to plaintiffs in any event.

MACMAHON, J.

OCTOBER 28TH, 1904.

CHAMBERS.

REX v. TORONTO R. W. CO.

*Criminal Law—Indictment of Electric Railway Company—
Nuisance—Endangering Lives of Public—Removal from
Sessions into High Court—Difficult Questions of Law.*

Motion by defendants for a certiorari to remove an indictment found at the General Sessions of the Peace for the county of York on 5th October, 1904, into the High Court.

J. Bicknell, K.C., for defendants.

J. R. Cartwright, K.C., for the Crown.

MACMAHON, J.—The indictment contains four counts, the first of which charges that defendants, during the years 1901, 1902, 1903, and 1904, down to the date of the indictment, have been operating in the city of Toronto an electric

railway, and have been running cars by electric power for the purpose of carrying passengers upon the public streets and highways in the said city on which the tracks of the railway were laid; and that defendants had and have a large number of cars used for the purpose of operating the said railway for the purpose of carrying passengers upon the said streets and highways; and that defendants were bound to use only cars of such design and equipped with such proper and sufficient fenders, guards, and brakes as would avoid danger to human life; and that, in the absence of reasonable precaution and care, the cars so operated and run by defendants as aforesaid, might endanger human life; and that defendants are under a legal liability to take reasonable precaution to avoid such danger to human life in operating such cars as aforesaid; but defendants, during the time aforesaid, unlawfully neglected and omitted to take reasonable precautions to avoid danger to human life in the operation of their said cars upon the said streets and highways, to wit, by having in their charge and under their control and by maintaining and operating cars which are not of such design, and without such proper and sufficient fenders, guards, brakes, and appliances as would avoid danger to human life, and by improperly, illegally, and negligently maintaining, operating, and running the said cars, in consequence whereof the lives, safety, and health of the public, as well foot passengers as also other subjects of our Lord the King, during the time aforesaid, using the said streets and highways in the said city of Toronto, were endangered; and in consequence thereof the said corporation did thereby, during the time aforesaid, in the manner aforesaid, cause grievous bodily injuries to certain individuals, namely, William John Lee (then follow the names of 25 other persons); and that defendants, during the time hereinbefore set out, in manner aforesaid, unlawfully did commit a common nuisance, thereby then endangering the lives, safety, health, property, and comfort of the public, as well foot passengers as other subjects of our said Lord the King, against the form of the statute in that case made and provided, and against the peace of our Lord the King, his crown and dignity.

The second count charges that defendants, during the time and in the manner in the preceding count set out, did unlawfully commit a common nuisance, thereby then occasioning injury to the persons of certain individuals, to wit, William John Lee (then follow the names of the 25 other persons), against the form of the statute in such case made

and provided, and against the peace of our Lord the King, his crown and dignity.

The third count charges that defendants did unlawfully and negligently maintain and run cars not of proper type for service and comfort and of a type dangerous to human life, and did unlawfully and negligently omit to supply the cars operated by them as aforesaid with proper fenders, guards, brakes, and appliances to avoid danger to human life, and did maintain, run, and operate the same without reasonable precaution and care, causing thereby grievous bodily injury to the said William John Lee (and the other 25 persons named) against the form of the statute, etc.

The fourth count charges that defendants ran a number of their cars without taking reasonable care to avoid danger to human life in the maintenance and operation of their cars, and without providing the said cars with proper and sufficient fenders, guards, and brakes to avoid danger to human life, whereby the lives and safety of the subjects of our Lord the King using the said streets were imperilled and endangered, and the said subjects of our Lord the King could not go, return, etc., with their horses, coaches, etc., through and along the said streets upon which defendants operated their railway and ran the said cars as they ought and were wont and were accustomed to do without great danger and common nuisance to all His Majesty's subjects going, returning, etc., through and along such streets upon which defendants ran their cars as aforesaid, to the evil example of all others, and against the peace of our Lord the King, his crown and dignity.

An affidavit is filed, sworn to by one of the solicitors for defendants, in which he states:—

“3. Nice and intricate questions or points of law will arise in the trial of the said indictment, and it is important that the same should be tried before one of the learned Judges of the High Court of Justice.

“4. Among the questions of law which will arise for determination are:—(a) what are the duties which, independent of the statute passed by the Ontario Legislature, 1 Edw. VII. ch. 25, are imposed upon electric railway companies to protect negligent people from injury by the use of life-guards or fenders; (b) whether the jury has the right to require an electric railway company to adopt any particular style or kind of brake; (c) whether, under the guise of

charging a nuisance, a number of separate and distinct alleged offences can be grouped together in one count of an indictment; (d) whether the indictment sufficiently charges any offences against defendants; (e) whether the said indictment is not multifarious; (f) whether defendants can be indicted as for a nuisance for want of reasonable care in the operation of their cars."

It being sworn that difficult questions of law are likely to arise, and the specific grounds on which legal difficulties will occur being stated, which are amply sufficient, the order for a certiorari should go: Short & Mellor's Cr. Pr., p. 96; The King v. Soule, 5 A. & E. 539; Regina v. Hodges, 9 Jur. O. S. 665; Regina v. Josephs, 8 Dowl. 128.

MACLENNAN, J.

OCTOBER 28TH, 1904.

C.A.—CHAMBERS.

BURR v. HAMILTON.

Appeal to Court of Appeal—Leave to Appeal—Ignorance of Change in Law—Consent—Acquiescence.

Motion by plaintiffs for leave to appeal to the Court of Appeal from order of STREET, J., dismissing an appeal from a Master's report. The application was made under amended sec. 76 (a) of the Judicature Act. In ignorance of the change of the law which made it necessary to obtain leave, notice of intention to appeal was served in due time according to the old law, and that was followed by delivery of reasons of appeal and also of reasons against appeal without objection that leave had not been obtained. On discovering that leave was necessary, plaintiffs made the motion.

W. M. Boulton, for plaintiffs.

C. A. Moss, for defendants.

MACLENNAN, J.A.—The reasons for and against appeal shew that the case is fairly arguable. Defendants could have consented to the appeal being brought to this Court,

and they have gone a long way towards consenting by accepting plaintiffs' reasons and answering them. Order made for leave as asked. Costs in the appeal.

MACMAHON, J.

OCTOBER 29TH, 1904.

CHAMBERS.

RE MURRAY.

Life Insurance—Change of Beneficiary—Incomplete Instrument—Designation by Will—Validity—Infant—Payment into Court.

Motion by the executors of the will and codicil of Clara Louisa Murray for an order under Rule 938 directing the applicants as to the disposition of \$500 arising from an insurance in the Independent Order of Foresters upon the life of the testatrix.

The testatrix died on the 14th May, 1904. The will and codicil were both executed on the day of her death. The will directed a sale of her goods and chattels and a division of the proceeds among her three children, and made the following specific bequests: "My wedding ring to Fanny Elizabeth, watch chain to May Lucy, silver brooch to Edna—life insurance to Edna."

On 27th February, 1903, the testatrix, during the lifetime of her first husband, Walter Wallen Gauen, applied for beneficiary membership in the Independent Order of Foresters. In her application she designated her three daughters as beneficiaries, and they were so named in the benefit certificate issued.

On 16th April, 1904, the deceased made a will by which she devised and bequeathed to her second husband, Wesley Everard Murray, all her "property and estate of every kind upon condition that he will out of the said property maintain my daughter Grace Edna Gauen during her minority, as long as my daughter continues to reside with him."

The deceased on 20th April, 1904, signed an application for change of beneficiaries in which she designated her hus-

band as beneficiary, adding "Grace Edna Gauen's support," but this was not sent in to the Order till after the death of the testatrix.

The husband claimed the money under this application, contending that it was a sufficient declaration of a change under secs. 151 and 160 of the Insurance Act.

The daughter Edna claimed the money under the last will of the deceased.

D'Arcy Tate, Hamilton, for executors.

F. W. Harcourt, for Grace Edna Gauen.

E. H. Ambrose, Hamilton, for the other daughters.

W. M. McClemon, Hamilton, for Wesley E. Murray.

MACMAHON, J.—By sec. 160 (1) of the Insurance Act, R. S. O. 1897 ch. 203, "the assured may, by an instrument in writing attached to or identifying the policy by its number or otherwise, vary a policy or declaration or an apportionment previously made so as to restrict or extend, transfer or limit, the benefits of the policy," etc.

That section also provides that the insured may by his will make or alter the apportionment of the insurance money; and an apportionment made or altered by will shall prevail over any other made before the date of the will, except so far as such other apportionment has not been acted on before notice of the apportionment by will.

Section 251 of the constitution of the Order of Foresters requires that the application for change of beneficiaries must be on form No. 14, filed in the "court" (or local branch) to which the insured belonged, filled in, and properly executed, setting forth fully and clearly the changes the insured desires to make, and surrendering to the "court" his benefit certificate.

The application for a change of beneficiary was not delivered to the record keeper of the local court, nor was the benefit certificate surrendered, so there was no compliance with sec. 251 of the constitution. . . .

[Reference to *Ireland v. Ireland*, 42 Hun 212; *Knights of Honour v. Nairn*, 60 Mich. 44.]

As the policy issued by the Foresters was the only life insurance held by the testatrix, the bequest to her daughter Edna

in the will of 14th May is, according to *Re Cheesborough*, 30 O. R. 639, sufficient under sec. 160 of the Act. So that, even if it could be held that there had been a valid apportionment by the application alleged to have been made by the instrument dated 20th April, 1904, the apportionment made by the will would prevail, unless the husband Wesley E. Murray is what he claims to be, a beneficiary for value. He alleges that he paid the premiums on the policy since his marriage to the deceased. Section 251 (c) of the constitution requires that before a change of beneficiaries takes place, the insured must furnish satisfactory evidence that the insured, and not the beneficiary, has paid the premiums on account of the benefit certificate; and in the application to change the beneficiary under which the husband claims, the insured states that she has paid the premiums. The application does not state that he (Wesley E. Murray) is a beneficiary for value; and by an amendment made by 1 Edw. VII. ch. 26, sec. 15, to sec. 151 (3) of the Insurance Act, it is provided that "a beneficiary shall only be a beneficiary for value when he is expressly stated to be so in the policy." *Bunnell v. Shilling*, 28 O. R. 336, is therefore no longer an authority.

In the will of 16th April, by which the testatrix devised all her property and estate of every kind to her husband, the life insurance is not mentioned, and it would not pass. But, even if it could be held to pass, it is upon condition "of his supporting the testatrix's daughter Edna Gauen during her minority, and he would therefore be a trustee for that purpose. And also by the application for a change of beneficiary he would, had the change been made, have been a beneficiary for "Edna Gauen's support," and a trustee of the \$500 for that purpose. So that, if it were possible in either case to hold in favour of the husband, there would have been a direction to bring the amount into Court.

The change made by the will of 14th May, making Edna Gauen the beneficiary, must prevail. The Order of Foresters having paid the amount of the policy into Court, that sum will, less the costs of the executors and the official guardian, be transferred to the credit of this matter. See *Re Humphries*, 18 P. R. 289.

BRITTON, J.

OCTOBER 29TH, 1904.

TRIAL.

HILL v. TAYLOR.

Negligence — Collapse of Municipal Building — Injury to Workman — Liability of Employers — Contractors for Work — Liability of Municipal Corporation — Employment of Architect—Independent Contractor.

Plaintiff was seriously injured in the collapse of a large building which was being erected by the corporation of the city of Ottawa for the purpose of an annual fat stock exhibition, and brought this action against Taylor & Lackey, his employers, who were the contractors for the carpenter work, and against the city corporation, to recover damages for his injuries.

The action was tried with a jury at Ottawa.

W. Wyld, Ottawa, and Glyn Osler, Ottawa, for plaintiff.

G. F. Henderson, Ottawa, for defendants Taylor & Lackey.

T. McVeity, Ottawa, for defendant corporation.

BRITTON, J.— . . . The city employed one M. C. Edy, an architect, to prepare the plans and specifications, and then let the work to different contractors for the erection of the building, in accordance with such plans and specifications. Defendants Taylor & Lackey were the contractors for the carpenter work, including putting on the roof and putting in the supports necessary to sustain it. Plaintiff was a workman employed by Taylor & Lackey, and at the time of the collapse was rightfully at his work inside the building.

At the trial questions were submitted to the jury, who found that the falling of the roof was occasioned by the breaking of the truss rods, and that the architect, M. C. Edy, was guilty of negligence in providing for truss rods of insufficient strength. The jury completely exonerated defendants Taylor & Lackey from any negligence and from any knowledge that the building was unsafe. The jury assessed the damages at \$2,500 against the city corporation, in case plaintiff is entitled to recover from the corporation.

Is plaintiff, upon the undisputed facts and upon the finding of the jury of negligence on the part of the city architect, Edy, entitled to recover? At the trial I reserved my decision upon the motion of the city for a nonsuit, and also upon the city's motion for judgment. The case is one of considerable importance.

There was no evidence of knowledge on the part of the city of incompetence of the architect; indeed, apart from this particular work, there was no evidence that Mr. Edy was, in fact, in any way incompetent. He was an architect of good standing, of considerable experience, and had for a long time carried on his business or profession at Ottawa, having been employed in the construction of many buildings.

There was no evidence of any negligence or want of care in employing him. Edy was, as found, in fact negligent, or had not the requisite professional knowledge to enable him properly to specify for so large a building and with such a roof. It must be assumed for the purpose of this case that the city corporation were the owners of the land, and that the building was being lawfully erected thereon by them for the use of the public. This work was not necessarily dangerous. It was not in the nature of a nuisance—not in the natural order of things likely to injure any one. The architect was employed to do his part of the work in his own way and according to his supposed skill and knowledge. If he had properly done his work no damage would have resulted. If it had been part of the instructions of the city to the architect that the roof was to be of a certain span or size, and was to be supported by rods of a particular size, or if the city in any way interfered with the work of the architect, there might be liability; but here, putting in the rods found to be defective was not the necessary consequence of what the architect was employed to do. He was to determine the size and strength of the iron to be used, and he was an independent contractor as to that.

It was argued by counsel for plaintiff that the city in erecting the building owed a duty to the public that the building should be safe, and that duty could not be delegated. . . .

[Joliffe v. Woodhouse, 10 Times L. R. 553, Hudson's Building Cases, vol. 1, p. 71, Walker v. McMullen, 6 S. C. R. 241, referred to.]

What was the duty of the city to the public in the erection of the building in question? It was not that they should, by their permanent officers, whose duties are prescribed by statute, do the work. No member of the city council need have any skill in or knowledge of building. . . . The duty of the city was, to let the work in its different branches to persons supposed to be skilled therein.

What did the city undertake to do in erecting this building? It undertook to erect it, not by giving directions to any general officer or servant of the corporation or to a committee of the council, but to a skilled person. I think the city performed its duty, and answered its undertaking to the public, in being careful to employ an architect believed to be competent, and in letting the work to independent contractors. . . . The architect was employed "to produce a given result," but in the actual execution of that work he was not under the direction or control of the city. . . .

[Reference to *Hall v. Lees*, [1904] 2 K. B. 602; *McCann v. City of Toronto*, 28 O. R. 650; and cases cited by Mr. Labatt in his article on Liability of Employers in 40 C. L. J. pp. 532, 533.]

I think the weight of authority is against holding the city liable. I am of opinion that this is not a case for the application of the maxim "respondeat superior." I think there was not between Edy and the city the relation of master and servant such as to make the city liable for the injury to plaintiff which resulted from Edy's negligence. . . .

I must direct judgment to be entered for all the defendants.

If upon the evidence and the findings of the jury the city are liable, plaintiff will be entitled to recover the \$2,500, as assessed, with costs. I understood that counsel for Taylor & Lackey did not ask for costs, and, for reasons which appear to me sufficient, I think judgment should be without costs as to all defendants.

BRITTON, J.

OCTOBER 29TH, 1904.

TRIAL.

MAUGHN v. GRAND TRUNK R. W. CO.

Water and Watercourses—Railway—Riparian Proprietors—Diversion of Water—Sale of Water—Injury to Riparian Proprietor below—Injunction—Declaration of Right—Damages.

Plaintiff was the owner of part of lot 2 in the 1st concession from the bay in the township of York. On this land was a pond, fed by a natural stream flowing from the north. Defendants' line of railway crossed this stream in the township of York. Some years before action defendants erected a pumping station and plant on the bank of this stream, on the northerly side of their right of way, and interfered with the natural flow of the stream, and diverted water therefrom, putting the water into their tanks, and using it not only for their own purposes, for their locomotives, but selling it to the corporation of the village of East Toronto, and supplying that village and its inhabitants with water for fire protection and domestic and other purposes. This diminished the flow of water to plaintiff's pond, and the water in the pond, by reason of the diversion of water from the stream, became stagnant and foul, to plaintiff's damage; and, he brought this action for an injunction and damages in respect of the diversion.

I. F. Hellmuth, K.C., and D. W. Saunders, for plaintiff.

W. R. Riddell, K.C., for defendants.

BRITTON, J.—The evidence shews beyond doubt that plaintiff's right to the flow of this stream has been interfered with by defendants. The case seems wholly covered by authority: *McCartney v. Londonderry and Lough Swilly R. W. Co.*, [1904] A. C. 301. This case overrules *Earl of Sandwich v. Great Northern R. W. Co.*, 10 Ch. D. 707; but, even if the latter case was authority, defendants could hardly hope to succeed, as here the water taken was largely not for defendants' own purposes, and the quantity taken was more than a reasonable quantity.

Defendants as riparian proprietors have no right to use the water of this stream, to the prejudice of plaintiff, to

supply East Toronto: see Wilts and Birts Canal Co. v. Swindon Waterworks Co., L. R. 9 Ch. 451, L. R. 7 H. L. 697.

Plaintiff is entitled to an inquisition as asked.

It appears from the evidence that plaintiff will not suffer any further damage or be inconvenienced by what defendants have done or are doing during the autumn or coming winter or during the freshets of 1905, so I think complete justice may be done by allowing defendants a reasonable time to make other arrangements with the village of East Toronto for a water supply.

The injunction should not issue until 1st May, 1905.

Judgment will be for plaintiff for a declaration of plaintiff's right to the flow of the water; for a declaration that defendants have wrongfully diverted the water which flows into and supplies the pond on plaintiff's land . . . ; for an injunction restraining defendants perpetually from further wrongful diversion; and for a reference to the Master to inquire and state what damages, if any, plaintiff has sustained by reason of such wrongful diversion of water as stated; damages to be limited to such as are not barred by the Statute of Limitations. Costs up to and inclusive of trial to be paid by defendants. Further directions and subsequent costs reserved.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING NOVEMBER 5TH, 1904.)

VOL. IV. TORONTO, NOVEMBER 10, 1904. No. 11

ANGLIN, J.

NOVEMBER 1ST, 1904.

CHAMBERS.

PERRINS (LIMITED) v. ALGOMA TUBE WORKS
(LIMITED).

*Discovery—Examination of Officer of Foreign Corporation—
Provisional Director—Officer out of the Jurisdiction—
Rule 439 (a).*

Appeal by defendants from order of Master in Chambers (ante 233) directing that a commission may issue to take the examination for discovery of John J. Freeman, an officer of defendant corporation resident in the city of Philadelphia, U.S.A.

W. E. Middleton, for defendants.

C. A. Moss, for plaintiffs.

ANGLIN, J.—With great respect, I am of opinion that this order cannot be supported. In the first place a commission for the purpose of an examination for discovery is machinery not contemplated by the Rules making provision for such examinations. "These Rules were intended to provide a complete code of procedure applicable to persons resident within the jurisdiction of the Court and to persons residing out of that jurisdiction." *Connolly v. Dowd*, 18 P. R. 38, 39. The group of Rules dealing with the examination of residents of this Province expressly extends to the examination of officers of corporations (Rule 1250). The Rule providing for the examination of persons out of the Province is in terms restricted to parties litigant. Whether the omission to provide for the examination for

discovery of non-resident officers of litigating corporations be accidental or designed, I am unable to read into this "code of procedure" something which it certainly does not contain. Its inability to secure obedience to any order such as that which plaintiffs seek, by any sanction which the Court has power to enforce, is a sufficient reason for the belief that this *casus omisus* is such of deliberate purpose on the part of the framers of our Consolidated Rules. No "practice hitherto always followed" is "a sufficient warrant" for making an order which the Rules do not authorize: *Appleby v. Turner*, 19 P. R. 175, 177.

Appeal allowed with costs to defendants in any event.

ANGLIN, J.

NOVEMBER 1ST, 1904.

WEEKLY COURT.

FRASER v. MUTCHMOR.

Mortgage—House upon Adjoining Lot Projecting upon Mortgaged Land — Reformation — Construction — General Words—Short Forms Act—Description—Plan—Title—Registry Laws—Appeal—Costs.

Appeal by defendant Mansfield from report of local Master at Ottawa.

J. Kidd, Ottawa, for appellant.

H. A. Burbidge, Ottawa, for plaintiff.

T. A. Beament, Ottawa, for defendants A. P. and Ida Mutchmor.

ANGLIN, J.—Plaintiff is mortgagee of lot 4. Defendant Mansfield owns lot 3 adjoining. A building erected upon lot 3 extends over a small triangular piece of land which is part of lot 4. Plaintiff brings the present action for foreclosure, upon his mortgage, joining as defendants the mortgagor, A. P. Mutchmor, his wife Ida, and also Mansfield, whose only remaining interest is in respect of the projecting angle of his house. . . . Defendants the Mutchmors not having appeared, a præcipe judgment was entered against them. Defendant Mansfield defending in respect of the part of lot 4 covered by the north-western angle of his house, the action came down for trial to determine the title to this small triangular piece of property. By consent an order was pronounced referring the action for trial to the local Master at Ottawa. From his report, finding that defendant

Mansfield has no title to the small strip of land in question, the present appeal is taken. . . .

Mansfield claims title to this strip of land by grant, express or implied, or by possession.

Both lots were originally owned by one Alexander Mutchmor. Having first built the house in respect of which the present difficulty arises, he had a plan prepared and registered in June, 1872, covering, amongst other lands, those subsequently known as lots 3 and 4. The boundary line between these two lots was so run that, while the main part of the house built by Mutchmor stood upon lot 3, a small triangular-shaped portion extended over part of lot 4. According to this plan the subsequent sales were made.

In July, 1872, Alexander Mutchmor conveyed lot 3 to one Campbell; in September, 1872, he conveyed lot 4 to one Lawrence. There can be no doubt that all parties in 1872 acted upon the assumption that the building in question was wholly upon lot 3. The Master so finds. . . . The deed to Campbell describes the lands conveyed to him as lot 3 according to the registered plan. The deed to Lawrence describes the lands conveyed to him as lot 4 according to the same plan. These descriptions have been carried down through all the conveyances and mortgages of the respective properties.

The ownership and possession of the two properties remained distinct until June, 1883. From that time until 1896 one Lucy McCuaig owned both, subject to outstanding mortgages. In 1892 she mortgaged lot 3 to defendant Mansfield, who in 1896 foreclosed and obtained possession, up to that time held by Mrs. McCuaig. In 1893 Mrs. McCuaig mortgaged to Alexander Mutchmor lot 4, and, through foreclosure proceedings in respect of that mortgage and a subsequent mortgage to himself by A. P. Mutchmor, plaintiff claims title. The legal estates in these properties appears to have been from the beginning and throughout outstanding in different mortgagees, holding distinct mortgages on the respective lots.

Whatever might have been the rights of the original grantee of lot 3 in an action for the reformation of the Mutchmor deed of 1872, and whether, if such relief were sought, it would be granted, no such claim is made in this action. Any equity to reformation is probably destroyed by the provisions of the Registry Act. Whatever may have been the effect, upon the state of the title, of the possession

The policy of the registry laws is to secure to the holder of the registered conveyance title as against the grantee under an unregistered deed of prior date. The statute provides for the registration of plans, and makes them binding. All instruments to be registered against lands covered by registered plans must conform thereto. The mortgagee of lot 4, upon search in the registry office, would find nothing registered against that lot. The mortgage to Mansfield is registered against lot 3 only. If read, it would not give rise even to a suspicion that it covered any part of lot 4, to which in its entirety another chain of title stood upon the register. Though registered, inasmuch as it affected lot 3, so far as this mortgage may have affected part of lot 4, if at all, it must, in my opinion, be deemed an unregistered instrument. To permit it to defeat the registered title of the plaintiff to any part of lot No. 4, would, I think, to a great extent render nugatory the salutary provisions of the Registry Act and frustrate the intention of the Legislature.

Nothing short of actual notice of the title under which defendant Mansfield claims—such notice as would make it a fraud on the part of plaintiff to insist on the protection of the Registry Act—is sufficient to preclude him from claiming in a court of equity the legal priority conferred by that statute: *Harrington v. Spring Creek Cheese Manufacturing Co.*, 7 O. L. R. 319, 325; *Ross v. Hunter*, 7 S. C. R. 289, 323; *Rose v. Peterkin*, 13 S. C. R. 677, 694-5; *Gray v. Bell*, 23 Gr. 390, 393.

Therefore, whether or not, as against his mortgagor, Mansfield acquired title to the piece of land in question, upon the ground that the Registry Act protects the registered title of plaintiff to lot 4 in its entirety, the latter is, in my opinion, entitled to the dismissal of this appeal from the Master's finding in his favour.

I have carefully considered Mr. Kidd's argument upon the question of costs. Mansfield was a necessary defendant in respect of the portion of lot 4 which, upon service of the writ, he offered to relinquish. By his defence he distinctly raises the issue as to title, which entailed all the expense of the trial, and which has been determined against him. I find no sufficient ground for interfering with the disposition made of the costs by the Master. Defendant Mansfield must pay plaintiff's costs of this appeal. There will be no order as to the costs of the other defendants.

NOVEMBER 1ST, 1904.

DIVISIONAL COURT.

DINI v. FAUQUIER.

Executors and Administrators—Action under Fatal Injuries Act—Status of Administrator—Person Having no Interest in Estate—Action Begun before Grant of Administration—Fiat—Judicial Act—Fraction of Day.

Action by the administrator of the estate of Augustino Fancelli, deceased, against Fauquier Brothers, to recover damages under Lord Campbell's Act for having negligently caused the death of deceased.

Defendants, besides denying any negligence, pleaded that plaintiff was not at the time of the commencement of the action the administrator of the deceased.

The damages were claimed in the statement of claim for Egidio and Creusa Fancelli, the father and mother of the deceased, both of whom were alleged to be living near Pisa, in Italy. The action was tried before Idington, J., and a jury.

It appeared at the trial that plaintiff had applied to the Surrogate Court of the district of Algoma, some time before the issue of the writ, for a grant to him of letters of administration, alleging himself to be authorized for the purpose by the father of the deceased, and that on 23rd January, 1903, an order was made by the Judge of that Court for the issue to the plaintiff of letters of administration, but that the letters of administration were not actually issued by the registrar until 26th January, 1903. The writ of summons in the present action was issued on 23rd January, 1903.

The Judge left questions to the jury, which were answered in plaintiff's favour, finding that defendants had been guilty of negligence which caused the accident; that deceased had not been guilty of contributory negligence; and they assessed the damages at \$500.

The Judge reserved to himself the disposition of the question as to whether plaintiff was entitled to maintain the action before the actual grant to him of letters of administration. Subsequently, on 16th June, 1904, he gave judgment upon this point in favour of the defendants and ordered the action to be dismissed without costs and without

prejudice to plaintiff bringing a further action if so advised:
3 O. W. R. 786.

Plaintiff appealed to a Divisional Court.

W. M. Boulton, for plaintiff.

D. C. Ross, for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), was delivered by

STREET, J.—Defendants at the argument before us sought to sustain the judgment in their favour upon the facts of the case, and to shew that there was not sufficient evidence upon which to base the findings of the jury, but we are all of opinion and so determined at the conclusion of the argument, that the findings were fully justified by the evidence, and we reserved only the legal question as to the right of plaintiff to maintain the action, under the following circumstances:—

Some time before 23rd January, 1903, plaintiff applied to the proper Surrogate Court for the grant to him of letters of administration, in the ordinary form, to the estate of the deceased, and, having completed his papers, an order was made by the Judge on 23rd January, 1903, for letters of administration to issue to him. On the same day he began the present action, and letters of administration were actually issued to him on 26th January, 1903. My brother Idington, before whom the action was tried, dismissed the action, upon the ground that plaintiff at the time the writ was issued was not the administrator of the deceased, and that the subsequent grant of letters of administration three days after action was not sufficient and did not relate back so as to enable him to maintain it, because he was not personally interested in the subject matter of the action and was not one of the next of kin of the deceased entitled to take out letters of administration. He followed in this respect a judgment of his own in *Doyle v. Diamond Flint Glass Co.*, 3 O. W. R. 510, 7 O. L. R. 747, in which he had adopted dicta to the same effect in *Chard v. Rae*, 18 O. R. 376. *Doyle v. Diamond Flint Glass Co.* was reversed, 3 O. W. R. 921, but upon grounds not affecting the present question.

I have gone through all the cases cited upon the argument and many more, and have been unable to find any actual decision supporting the distinction relied on by defendants in the present case between the effect of letters of

administration granted to a person interested in the estate, and those granted to a person not interested. Before the Judicature Act a distinction was well established to the effect that in an action brought by an administrator it was necessary that letters of administration must have been granted before action, but that in an action by an executor it was sufficient if probate were taken out at any time before the trial. The reasons given for the distinction were that the executor's title was under the will, and probate was only necessary for the purpose of proving his title, while an administrator had no title except under the letters of administration; and further that an administrator in an action at law was obliged to make over of the letters of administration.

The distinction did not however exist in equity. In the early case of *Fell v. Lutwidge*, Barnardiston Ch. 320, decided in 1740, upon an objection being taken that a widow, party to the suit and claiming as administratrix of her late husband, had not taken out letters of administration until after suit, Lord Hardwicke said: "It was very true that this would have been an exception in an action at law, but that it was not so to a bill brought in this Court." In the report of the same case in 2 Atk. 120, the reason why the rule is otherwise at law is stated to be because there the defendant may crave over of the letters of administration.

In *Humphreys v. Humphreys*, 3 P. Wms. 349 (1734), where an only daughter had taken out letters of administration, after suit brought, to the estate of her father, Lord Chancellor Talbot, "not without some warmth in respect of the delay," observed "that the mere right to have an account of the personal estate was in the plaintiff, Hellen, the daughter, as she was the next of kin to her father, Colonel Lancashire; and it was sufficient that she had now taken out letters of administration, which, when granted, related to the time of the death of the intestate, like the case where an executor before his proving the will brings a bill, yet his subsequent proving the will makes such bill a good one, though the probate be after the filing thereof." This case, it will be observed, was decided six years before *Fell v. Lutwidge*.

These cases, with many others, are referred to in the judgment of Blake, V.-C., in *Edinburgh Life Assce. Co. v. Allen*, 19 Gr. 593.

In *Trice v. Robinson*, 16 O. R. 433, it was held by Boyd, C., that since the Judicature Act the former rule in equity

is to prevail as opposed to the rule at law, that letters of administration, when obtained, relate back to the death, and that it is sufficient if a plaintiff suing as administrator qualifies before trial.

In all the cases to which reference has been made, down to and including *Trice v. Robinson*, it appears to have been the case that the persons appointed administrators after suit or action were persons interested in the estate, and in many of the cases that circumstance is mentioned, but I do not read any of them as turning upon that point, or as suggesting that a different rule would have prevailed had the administrator not been interested. It is treated as a matter of course that the letters of administration have been granted to the person entitled to them, and that person in ordinary cases is one of the next of kin.

In *Chard v. Rae*, 18 O. R. 371, the question seems to have been first raised as to whether administration granted after action was sufficient to entitle a plaintiff to maintain an action brought by him as administrator at a time when the person entitled in priority to him as administrator had not renounced. I read the judgment of *Boyd, C.*, in that case as rather suggesting the point now under discussion, and as deciding the case upon the ground that there could at all events be no relation back of the letters of administration to the date of the commencement of the action where the effect would be to prevent the bar of the Statute of Limitations.

The next case seems to be *Doyle v. Diamond Flint Glass Co.*, 3 O. W. R. 510, in which *Idington, J.*, seems to have treated the distinction as an established one, and he has adopted the same view in his judgment in the present case.

In my opinion, the unqualified language of *Lord Hardwicke* in *Fell v. Lutwidge* expresses the rule which should be followed, viz., that letters of administration taken out after action and before the trial, when the plaintiff brings his action as administrator, are sufficient to support the action. It is contrary to authority to divide administrators into two classes, those who have rightly obtained administration and those who have not, because the grant of letters of administration by the proper Court is conclusive while unrevoked upon the question of the right to them, and no other Court can permit it to be gainsaid: *Attorney-General v. Pontingdon*, 3 H. & C. 193, at 204; *Re Ivory*, 10 Ch. D. 372; *Eades v. Maxwell*, 17 U. C. R. 173, 180; *Book v. Book*, 15 O. R. 119.

A plaintiff, therefore, suing as administrator, and producing letters of administration at the trial, is justified in refusing to submit to any inquiry as to his right to appear in the character, and must, in my opinion, be treated as being the person who was entitled to obtain them at the time the action was begun.

In the present case there is, however, the further circumstance that the Judge of the proper Surrogate Court had on the day the writ was issued ordered that letters of administration should be issued to the plaintiff.

This was a judicial act and is to be treated as taking precedence in point of time over the issue of the writ, which was not a judicial act: *Converse v. Michie*, 16 C. P. 167; *Clark v. Bradlaugh*, 8 Q. B. D. 62.

It was contended by plaintiff, upon the authority of *Eldon v. Keddell*, 8 East 187, *Edwards v. Reg.*, 9 Ex. 631, and *Ramsbottom v. Buckhurst*, 2 M. & S. 567, that the grant of letters of administration should be held to date from the order of the Judge, and that the order, being a judicial act, must be taken to have been made before the writ issued. I think a difficulty exists to our so holding because of the fact that, by Surrogate Court Rule No. 25, a caveat entered after the order, and before the actual issue of the letters of administration, would prevent their being issued. I think, however, that the existence of an order for their issue before the commencement of the action was at all events such a declaration of his right to obtain them as would make them when issued relate back to the date of the order.

I am of opinion, for these reasons, that the judgment dismissing the action should be set aside with costs of the present motion, and that judgment should be entered for the plaintiff with the costs of the action.

MACLAREN, J.A.

NOVEMBER 1ST, 1904.

C.A.—CHAMBERS.

HAMILTON v. MUTUAL RESERVE LIFE INS. CO.

Appeal to Supreme Court of Canada—Leave to Appeal after Time Expired—Special Circumstances.

Motion by defendants, under sec. 42 of the Supreme and Exchequer Courts Act, for allowance of an appeal to the Supreme Court of Canada from the judgment of this Court

(3 O. W. R. 851), notwithstanding that the appeal was not brought within the 60 days prescribed by sec. 40 of the Act.

Shirley Denison, for defendants.

D. L. McCarthy, for plaintiffs.

MACLAREN, J.A.—The judgment of this Court was given on 29th June last, and dismissed defendants' appeal from the decision of the trial Judge in favour of plaintiff. Notice of appeal was given only on 16th September. In an affidavit filed on behalf of defendants the delay is accounted for: (1) by an impression that the time for appealing did not run in vacation; (2) by the absence of the solicitor who usually acted for defendants; and (3) by negotiations which finally proved to be abortive.

Section 42 of the Act says that an appeal may be allowed after the expiration of 60 days "under special circumstances," but does not indicate what such circumstances may be. In *Smith v. Hunt*, 5 O. L. R. 97, the Chief Justice of this Court, on an application in several respects not unlike the present, said: "Upon an application of this nature it lies upon the applicant to shew, among other things, a bona fide intention to appeal, held while the right of appeal existed, and a suspension of further proceedings by reason of some special circumstances."

In this case the 60 days expired on 28th August. Defendants' solicitors here only received instructions to appeal on 8th September, and it does not appear that defendants intended to appeal before the letter received that day was written at the head office in New York.

Only one of several issues, namely, the validity of a release granted by the insured to defendants, was before the Courts on the trial and appeal which have already been had. This was done at the instance of defendants, and if the result had been in their favour, it would have terminated the litigation. The result, however, having been adverse to the company, the other issues remain to be tried, if defendants do not obtain leave to proceed further.

On the whole I do not see that there is sufficient in the present case to distinguish it from the case of *Smith v. Hunt* . . . and I do not consider that justice requires that leave to appeal further on this issue should be granted. See the remarks of the Master of the Rolls in *In re Manchester Economic Building Society*, 23 Ch. D. at p. 497.

Motion dismissed with costs.

ANGLIN, J.

NOVEMBER 2ND, 1904.

CHAMBERS.

ARMSTRONG v. ARMSTRONG.

Costs—Discontinuance of Action—Depriving Defendant of Costs—Discretion—Good Cause—Rule 430 (4)—Appeal.

Appeal by defendant from order of Master in Chambers (ante 223) allowing plaintiff to discontinue the action without costs.

Shirley Denison, for defendant.

J. H. Spence, for plaintiff.

ANGLIN, J.—. . . I have carefully considered all the English authorities upon which counsel for defendant relied, and my view is . . . that the English Rule No. 290 (Order xxvi., r. 1) confers on the Court or a Judge full power and discretion to deal with the costs of an action upon permitting it to be discontinued, as the learned Master has done in this case.

The Master in his written opinion obviously assumes the wording of the English Rule to be identical with our present Con. Rule 430 (4) as to discontinuance by leave, and the argument before me proceeded upon the same assumption. A difference which if designed would be of the greatest significance seems to have escaped attention. The English Rule reads: "Save as in this Rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or to discontinue the action without leave of the Court or a Judge, but the Court or a Judge may before, or at, or after the hearing, upon such terms as to costs, and as to any other action and otherwise (as may be just), order the action to be discontinued or any part of the alleged cause of complaint to be withdrawn."

Rule 430 (4), though otherwise substantially the same, omits the words "as may be just." Construing this Rule as if this omission were intended, I would, in view of the retention of the word "such," read it as enabling the Court to order discontinuance only upon the terms as to costs mentioned in clause 1 of Rule 430, which would absolutely entitle defendant to his costs. I do not think Rule 1130 applicable, in view of the express provisions as to costs in Rule 430, which forms a complete code of procedure governing discontinuance.

But, upon examining the history of the Rule, I cannot believe that the omission of words similar to "as may seem just," was designed. Rule 641 of the Rules of 1888 contained the words "as may seem fit" immediately after the word "otherwise." Rule 431 of the present consolidation, dealing with withdrawal of defence or counterclaim, contains the words "upon such terms as may seem just." The corresponding Rule (No. 642) of the consolidation of 1888 contained the words "upon such terms as may be imposed." In Rule 430 (4), as now framed, no meaning whatever can be given to the words "and otherwise," if the word "such" is to be read as relating to the foregoing parts of the Rule. I cannot but think that if it were intended to omit the words "as may seem fit," the word "such" would also have been eliminated; and I therefore would read our Rule either omitting the word "such" or as if it contained the words "as may seem fit" or "as may seem just" immediately after the word "otherwise." So read, it, in my opinion, gives to the Master ample power for good cause to deprive a defendant of his costs where an action is discontinued by order made under that provision: *Musman v. Boret*, 66 L. T. R. 171.

If this order be appealable—as to which I determine nothing—I am unable to say that the cause for which the Master, in the exercise of his discretion, refused costs to defendant, was not adequate.

Appeal dismissed with costs.

ANGLIN, J.

NOVEMBER 2ND, 1904.

WEEKLY COURT.

RE SOLICITORS.

*Solicitor — Costs — Taxation of Solicitor and Client Bill—
Re-taxation—Special Circumstances—Quantum of Coun-
sel Fees and other Charges.*

Appeal by the Grimsby Public School Board from the taxation of the solicitors' bills of costs by the local officer at Hamilton.

C. A. Moss, for appellants.

A. O'Heir, Hamilton, for solicitors.

ANGLIN, J.—At my request the senior taxing officer at Toronto has considered the items particularly objected to

by the clients who appeal, and has certified to me the amounts which, if taxing these bills, he would have allowed in respect of these items. He has not reported in regard to the general objection taken in the notice of appeal, "that the bills were taxed on an exorbitant scale throughout." Rule 773 makes applicable to these appeals the procedure governing appeals from the report of a Master; Rule 771 requires that upon such appeals the notice of appeal shall set out the grounds of appeal.

Section 48 of the Act respecting Solicitors, R. S. O. 1897 ch. 174, forbids re-taxation, unless, under special circumstances, the Court thinks fit to direct it; and, to establish such a case of special circumstances, improper charges should be specified and proved: *Eastman v. Eastman*, 2 Ch. Ch. 325. Upon appeal the Court cannot itself, upon a mere general charge of exorbitancy in the allowances made upon taxation, be expected to review and re-tax the entire bill. To ask an officer to do so, as delegate of the Court, would be in effect to direct a re-taxation within the purview of sec. 48. Neither upon the argument before me, nor by what the senior taxing officer reports, am I satisfied that such special circumstances exist as would justify me in directing a re-taxation of these bills.

As to the particular items in respect of which the senior taxing officer reports that, if taxing under an order of reference to himself in the first instance, he would have allowed smaller sums than have been taxed by the local officer, in all to the extent of \$44, I do not think I should allow the clients' appeal. Three of these items are counsel fees. It is only with the quantum of these that the appellants quarrel, and, upon the matter of such quantum, the decision of the local taxing officer is conclusive: *Denison v. Woods*, 18 P. R. 328. The remaining \$14, which the senior taxing officer would have disallowed, under the circumstances stated in his report, represent what he deems excessive allowances in respect of certain instructions and consultations. Again, the quarrel is merely with the quantum of the local officer's allowance. No question of principle is involved. The amount is comparatively trifling. To encourage an appeal upon such a matter alone would, in effect, so hamper and fetter the discretion of the taxing officer as to utterly destroy it.

Upon the whole, I think the appeal should be dismissed, but, in view of the report made by the senior taxing officer, I shall, in the exercise of my discretion, make no order as to costs.

STREET, J.

NOVEMBER 2ND, 1904.

TRIAL.

CITY OF TORONTO v. GRAND TRUNK R. W. CO.

*Railway—Bridge—Contribution to Cost and Maintenance—
Liability of Railway Company—Construction of Agree-
ments with City Corporation—Exemption or Indemnity.*

Action by the corporation of the city of Toronto against the Grand Trunk R. W. Co. and the Canadian Pacific R. W. Co. to have it declared that the Grand Trunk Co. were liable under an agreement between them and the other parties to the action, dated 26th July, 1892, to contribute to the cost of an iron overhead bridge on York street, Toronto, spanning the tracks of defendants; and that the Grand Trunk Co. were not exempt or entitled to be indemnified by plaintiffs from liability to contribute to the cost of the bridge in question. Defendants the Canadian Pacific Co. were in the same interest as plaintiffs.

Defendants the Grand Trunk Co., by their statement of defence, denied any liability under the agreement or otherwise, and they asserted that under certain agreements with plaintiffs they were exempt, as between themselves and plaintiffs, from, and entitled to be indemnified by plaintiffs against, any liability to contribute to the building of the bridge.

C. Robinson, K.C., and J. S. Fullerton, K.C., for plaintiffs.

S. H. Blake, K.C., W. Cassels, K.C., and W. A. H. Kerr, for defendants the Grand Trunk Co.

E. D. Armour, K.C., and Angus MacMurchy, for defendants the Canadian Pacific Co.

STREET, J.—The facts bearing on the case are not in dispute, and the whole question seems to turn upon the construction to be given to the agreement of July, 1892, and to the various Acts of Parliament and the numerous previous agreements between plaintiffs and the Grand Trunk Co.

The agreement of July, 1892, contains a large number of clauses relating to the tracks of the two railway companies and the conduct of their freight and passenger business in the city of Toronto, manifestly intended for the mutual convenience and benefit of the three parties to it. . . .

Paragraph 7 provides that an overhead traffic bridge, with ramps and approaches for vehicles and passengers, is to be constructed by the Canadian Pacific Co., along York street, according to plans and specifications to be approved by the three parties to the agreement, and, in case of disagreement, by the Railway Committee of the Privy Council, the bridge to be carried from the south side of Front street to a point shewn on a plan attached to the agreement.

Paragraph 8 declares that nothing contained in the agreement is to affect the rights, if any, which the Grand Trunk Co. have under any existing agreements with the city, that the city shall not require the Grand Trunk Co. to build, find, or procure any bridges, ramps, crossings, or other approaches, over, along, or under the Grand Trunk Co.'s tracks on the Esplanade, but that the city shall provide all such, if any, when required, at their own expense, and that, by said agreements, the city guaranteed, etc.

The bridge was built by the Canadian Pacific Co., and the cost of it was paid by the city and that company in equal shares. . . . The portion of York street for which the bridge has been substituted is crossed by some 25 tracks of the railways of the defendant companies, and the bridge was necessary in order that the large amount of travel along the street might not be obstructed, and might be safely continued.

I think it is not unfair to any of the parties to set out with the assumption that the bridge was a necessity both to the railways and to the inhabitants of Toronto doing business in that part of the city, and, being for their mutual convenience, that, apart from any question of exemption by contract, they might be expected mutually to contribute in proper proportions to the cost of building it. I think a perusal of paragraph 8 shews that the Grand Trunk Co., as well as the other two parties to the agreement, recognized this position as the *prima facie* one. The Grand Trunk Co. begin the paragraph by an express stipulation that nothing contained in the agreement is to affect the rights which they claim by agreements, as against the city, that they shall not be required to build any bridge, and that the city shall indemnify them against any demands made upon them by reason of their railway being placed on the tracks mentioned in the agreements, and that they have the right and privilege to cross streets in the city on the level for the purpose of access to their stations, etc. Provision is next made in the paragraph for a special case to determine whether the rights

so claimed by them do exist; and it is agreed that if the decision is in favour of the right of exemption and indemnity so claimed, then the cost of the bridge is to be borne by the city and the Canadian Pacific Co. alone; but, if the decision is against the right so claimed, then the Grand Trunk Co. are to pay a share of the cost of the bridge, the proportion which it is to bear being fixed by arbitration.

So far the paragraph is only what one might expect to find under the circumstances, and I cannot find any reason for doubting that there is an express agreement by the Grand Trunk Co. to bear their proper share of the cost of the bridge in the event of their failure to establish, to the satisfaction of the Court, their right to exemption and indemnity.

But one of the concluding sentences of the paragraph was relied on as doing away with any such agreement . . . "Nothing herein contained shall be construed as an admission on the part of the Grand Trunk Co. of any liability to contribute to the cost of the said bridge by reason of the amalgamation of the company with the Great Western or Northern Railway Co., or for any other reason, which liability the said Grand Trunk Co. expressly deny."

It is contended by the Grand Trunk Co. that here is to be found an express general denial of any liability whatever to contribute to the cost of the bridge, which must override any liability which might be deduced from the preceding portions of the paragraph. It is not difficult, however, to reconcile the two portions of the paragraph. If they are read together, they plainly mean this:—The Grand Trunk Co. deny any liability to contribute to the cost of the bridge, and nothing in this agreement is to be construed as an admission of liability; but, if the Court holds that they are not exempt under their agreements with the city, and are not entitled to indemnity, they will pay their share. . . .

The next question to be considered, therefore, is, whether the Grand Trunk Co. are entitled to be exempt from contribution to the expense of building this bridge, or entitled to be indemnified by the city against any such expense under any of the agreements with the city into which they had from time to time entered before the agreement in question. . . .

[Reference to the agreement for the building of the Esplanade, 4th January, 1854; the statute 18 Vict. ch. 175; the agreements between the city and the Grand Trunk Co. of 21st January, 1856, and 30th August, 1856; the statute C. S. C. ch. 66; the agreement between the city and the Grand Trunk Co. of 23rd December, 1862; the statute 28

Vict. ch. 34; the agreement between the city and the Grand Trunk Co. of 15th May, 1866.]

It appears then, upon a general review of the agreements to which the city has been a party, that it has granted to the Grand Trunk Co., or to the companies to whose rights the Grand Trunk Co. have succeeded, the following as the only rights which come in question here:—

1st. A right of way 40 feet wide along the whole south front of the Esplanade for railway purposes, but without any guarantee beyond that of title.

2nd. A right of way 12 feet 6 inches wide for railway purposes along the southerly limit of Esplanade street, east of York street.

3rd. The right, west of the east side of York street, to carry as many tracks as might be necessary for themselves or any other company using the Union Station upon, along, or across Esplanade street.

The evidence and the plans shew a number of tracks used by the Grand Trunk crossing York street under the present bridge, which are not upon any part of the Esplanade, and are therefore not specifically, nor, so far as I can discover, generally, authorized by any of the agreements with the city.

The claims of the Grand Trunk Co., as set out in the 8th paragraph of the agreement of 26th July, 1892, and relied on as a defence in the present action, are as follows:—

1st. That the city has agreed not to require the Grand Trunk Co. to build any bridges over their tracks on the Esplanade, but, on the contrary, has agreed to provide all such, when required, at its own expense.

This claim is apparently founded upon the agreement to that effect contained in the 17th paragraph of the agreement of 21st January, 1856, but, . . . that agreement referred to a proposed forty foot track at the top of the bank, and was expressly cancelled by the agreement of 30th August, 1856, which contained no such stipulation.

2nd. That, by certain existing agreements, the city guaranteed and indemnified the Grand Trunk Co. against all claims and demands whatsoever for or by reason of the railway of the Grand Trunk Co. being placed on the tracks in the said agreement mentioned.

The only guarantee to this effect is found also in the agreement of 21st January, 1856, in the concluding part of the 17th paragraph, introduced for the purpose of declaring the intention of the previous part of the paragraph more fully. It, therefore, must fall with the preceding portion of the paragraph, under the terms of the agreement of 30th August, 1856. The only guarantee in the latter agreement is found in the 7th paragraph, and . . . that is a guarantee of another character.

3rd. That, under certain existing agreements, the Grand Trunk Co. have the right and privilege to cross streets of the city on the level for the purpose of access to their stations and freight sheds in the city, in such way and as often as their business requires.

I can find no such general right in any agreement with the city.

Their rights under the agreements prior to the agreement of 26th July, 1892, seem to be confined, at York street, to those of running along and crossing the Esplanade and Esplanade street, including the right of crossing York street at its junction with the Esplanade and Esplanade street; but I can find nowhere in the agreements made before 26th July, 1892, now in force, a right given them to cross York street at any point not included within the limits of the Esplanade and Esplanade street, either at the level of the street or otherwise.

My conclusion, therefore, is, that the Grand Trunk Co. are not entitled, under any of their agreements with the city or otherwise, to exemption from liability to contribute to the cost of the construction and maintenance of the York street bridge, or to indemnity from the city against any such liability.

There should, therefore, in my opinion, be judgment containing a declaration to that effect, and declaring the liability of defendants the Grand Trunk Co. to be assessed for their proportion of the cost and maintenance of the bridge, such proportion to be ascertained in the manner provided by the agreement of 26th July, 1892; and defendants the Grand Trunk Co. should pay the costs, including those of a former trial, of plaintiffs and the Canadian Pacific Co.

CARTWRIGHT, MASTER.

NOVEMBER 3RD, 1904.

CHAMBERS.

COLEMAN v. HOOD.

Judgment Debtor—Transfer of Shares in Company—Injunction to Restrain Further Transfer — Examination of Transferee—Aid of Execution—Affidavit.

Motion by plaintiff for an order requiring defendant McIndoe to attend at his own expense for re-examination and to answer certain questions which he refused to answer upon an examination for evidence on a pending motion.

W. E. Middleton, for plaintiff.

W. J. Boland, for defendant McIndoe.

THE MASTER.—An interim injunction was granted in this case restraining defendants from dealing with certain stock alleged to be the property of defendant Hood, plaintiff having on 2nd September, 1904, recovered judgment for about \$3,600 against Hood. Plaintiff moved to continue the interim injunction, and for the purpose of that motion examined defendant McIndoe on 28th October. McIndoe admitted that he had been the holder of 200 shares of the stock in question. He said he thought they belonged to the wife of his co-defendant Hood, but could not give any very good reason for this opinion. He had already stated that he had transferred these shares about 6 months ago, but declined to say to whom or to produce a copy of the instrument of transfer.

From an affidavit of plaintiff made on 31st October it appears that no such transfer of the shares has ever been registered, and that the shares still stand in the books of the company in the name of McIndoe. From the same affidavit it further appears that the stock was originally issued to Hood, and the transfer to McIndoe was made at his request.

This affidavit was objected to, but I think it should be admitted, on the ground that this whole proceeding is really part of the procedure under the O. J. Act in aid of execution, and for the same reason I think that defendant should attend and answer the questions asked. Otherwise a judgment debtor might in many cases set his creditor at defiance. The whole of this procedure is remedial, as was said in

Gowans v. Barnet, 12 P. R. 335, and should therefore be construed so as to advance the remedy.

McIndoe must attend at his own expense, and the costs of this motion will be to plaintiff in any event.

CARTWRIGHT, MASTER.

NOVEMBER 3RD, 1904.

CHAMBERS.

READ v. CITY OF TORONTO.

Jury Notice—Striking out—Action against Municipal Corporation—Non-repair of Streets—Obstruction—Amendment.

Motion by defendants to strike out jury notice given by plaintiff as irregular, because plaintiff's action is for injuries caused by non-repair of highway.

F. R. MacKelcan (T. Caswell), for defendants.

Walter Read, for plaintiff.

THE MASTER.—The statement of claim, as first drawn, relied solely on non-repair. There was nothing said of what constituted the alleged non-repair. The statement of defence denied this allegation, and also set up want of notice. The statement of claim was then amended by alleging "obstruction of the highway caused by defendants negligently leaving piles of earth, stone, and gravel thereon." The following paragraphs, as in the original statement of claim, alleged non-repair as the cause of plaintiff's injury.

Counsel for plaintiff admitted that, as the pleadings now appear, the motion must succeed. He asked leave to amend further so as to rely on "obstruction" only and obtain the benefit of the decision in *Clemens v. Town of Berlin*, 7 O. L. R. 33, 3 O. W. R. 73. There was no allegation in that case of non-repair.

I do not think such leave should now be given. It must be assumed that the alleged obstructions were placed there by defendants. Then the case comes within the judgment . . . in *Barber v. Toronto R. W. Co.*, 17 P. R. 293 . . . *Howarth v. McGugan*, 23 O. R. 396.

The jury notice should be struck out with costs to defendants in any event.

See order of Street, J., in *Breakey v. City of Toronto*, 13th November, 1899 (not reported) in a similar case.

CARTWRIGHT, MASTER.

NOVEMBER 3RD, 1904.

CHAMBERS.

LEE v. BRITTON.

Parties — Joinder of Defendants — Principal and Agent — Contract for Sale of Land—Specific Performance—Damages.

Motion by defendants for order requiring plaintiff to elect against which of two defendants the action should proceed.

T. D. Delamere, K.C., for defendants.

H. Cassels, K.C., for plaintiff.

THE MASTER.—The statement of claim alleges a breach of a contract for sale of land made by defendant Macdonald as agent for his co-defendant. The relief asked is: (1) Specific performance of such contract; and (2) special damages for delay as against defendant Britton, and in the alternative damages against defendant Macdonald for wrongfully holding himself out as agent of his co-defendant, if such agency is not established.

The cases cited on the argument were those to be found in *Evans v. Jaffray*, 1 O. L. R. 614, and *Quigley v. Waterloo Manufacturing Co.*, ib. 606.

The matter is fully discussed by the Chancellor in the latter case. At p. 614 he uses language which seems decisive of the present motion: "The cases have at present defined the limits as being where the transactions involve dealings with principal and agent and landlord and tenant, even though the cause of action may be in form different, if there is substantially one legal transaction having different aspects, in which the defendants are implicated." To the same effect is the language of Meredith, C.J., at p. 608. . . .

Motion dismissed with costs to plaintiff in any event.

STREET, J.

NOVEMBER 3RD, 1904.

TRIAL.

CITY OF HAMILTON v. HAMILTON STREET R. W. CO.

Street Railways—Contract with Municipal Corporation—Sale of Workmen's Limited Tickets—Specific Performance—Mandatory Injunction—Parties—Attorney-General.

Action for a mandamus or mandatory injunction commanding defendants to continue to sell on their cars tickets

called "workmen's tickets" good for the payment of fares at certain hours of the day.

Defendants denied any binding obligation on their part to sell these tickets at all on the cars or to receive them from persons other than working men; and they alleged that the action in any event was not maintainable without the presence on the record of the Attorney-General; and that it was not such a contract as entitled plaintiffs to a judgment in the nature of specific performance.

The decision of MAGEE, J., upon a motion for an interim injunction is reported ante 207.

F. MacKelcan, K.C., and W. R. Riddell, K.C., for plaintiffs.

E. D. Armour, K.C., and G. H. Levy, Hamilton, for defendants.

STREET, J.—At the conclusion of the argument I gave judgment upon some of the questions involved, holding that, upon the proper construction of the contract and by-law and defendants' Acts of incorporation, they were bound to sell the tickets called "workmen's tickets" upon their cars to the public, and to receive them in payment of fares, at the hours mentioned in the by-law, not from working men only, but from the public generally, without regard to the occupation or absence of occupation of any person tendering them. I further held that the objection that the stipulation was *ultra vires* of plaintiffs was untenable.

I reserved only the questions: (1) as to the right of plaintiffs to maintain this action without adding the Attorney-General as a party representing the public; and (2) as to whether the remedy by mandamus or mandatory injunction could be granted.

I have not been referred to any authority in support of the contention that the Attorney-General is a necessary party to this action, and I have not been able to discover any. Plaintiffs were vested by law, if not with the ownership, certainly with full powers of management of the streets in Hamilton. One of the powers given them by statute was that of entering into an arrangement with defendants for the running by them of their cars through the streets, upon such terms as plaintiffs might see fit to require. The by-law No. 664, and the agreement by which defendants as well as plaintiffs agreed to be bound, were passed and entered into in pursuance of the legislative authority to that effect. Defendants have broken their agreement, as I have held, in

refusing to sell workmen's tickets on the cars, and in refusing to sell them to any persons but working men. The provision which defendants have broken was part of the consideration promised by them in return for the leave given them to use the streets of the city. It was an express contract entered into between plaintiffs and defendants, authorized by statute, and I see no ground for holding that an action to enforce it cannot be maintained by one of the parties to it without the aid of the Attorney-General . . . *Wilson v. Furness R. W. Co.*, L. R. 9 Eq. 28, at p. 34, last paragraph.

The remaining ground relates to the power of the Court to grant relief and the nature of the relief to be granted. Defendants have obtained from plaintiffs permission to lay their tracks in the public streets of the city, and to run their cars upon them, upon the faith of their promise to sell tickets on their cars at certain definite rates. After living up to this stipulation for 11 years, they have sought to alter the rates and to refuse to sell certain classes of tickets at all upon the cars, or to accept them from persons from whom, in my opinion, they were bound to accept them in payment of fares. In other words, they have endeavoured to charge higher fares than those which they agreed to charge in certain cases. Defendants had an undoubted right to submit their interpretation of the contract to the Courts for adjudication; but they have in the present action gone much further and contended that even if their interpretation should be held to be the wrong one, and that of plaintiffs the right one, plaintiffs, though having the right to enforce the agreement, were powerless, because of a supposed inability on the part of the Courts to compel defendants to perform it. They are endeavouring by this contention to retain the benefits of the agreement without performing the provisions upon which they obtained them. In *City of Kingston v. Kingston Electric R. W. Co.*, 28 O. R. 399, 25 A. R. 462, a similar contention was successfully raised, but in that case it was found that no relief could be given which did not involve a minute supervision over the working of defendants' line of railway.

In the present case what defendants have done is to run cars upon which they do not keep for sale to persons desiring the same the limited tickets called "workmen's tickets," contrary to sec. 19 (p.) of the by-law No. 664, embodied in the contract between plaintiffs and defendants.

If they are restrained from running cars upon which these tickets are not kept for sale, and this restriction is coupled with a declaration that they are bound to sell them

on their cars to all persons desiring to buy them, and to receive them from all persons in payment of fares during the hours mentioned in sec. 19 (c), I think the object of the present action will be attained without any violation of established principles, and I therefore so order and declare.

I refer to *Wilson v. Furness R. W. Co.*, L. R. 9 Eq. 28; *Greene v. West Chester R. W. Co.*, L. R. 13 Eq. 44.

Defendants must pay the costs of the action and injunction motion.

BOYD, C., TEETZEL, J.

NOVEMBER 3RD, 1904.

ELECTION COURT.

RE NORTH NORFOLK PROVINCIAL ELECTION.

SNIDER v. LITTLE.

Parliamentary Elections—Controverted Election Petition—Costs of Charges not Investigated at Trial—Excessive Particulars—Witness Fees.

The petition and cross-petition came on for trial before BOYD, C., and TEETZEL, J., at Simcoe. The cross-petition, not being prosecuted, was dismissed with costs. The petition was successful, and the seat was vacated with costs to follow the result, except as to the costs of uninvestigated particulars.

Argument as to these costs was heard at Toronto.

S. H. Bradford, for petitioners.

G. H. Watson, K.C., for respondent.

The judgment of the Court was delivered by

BOYD, C.—The total of votes polled was 3,400, and the respondent had a majority of 100. At the trial of the petition 16 witnesses were examined for the petitioners generally and with special reference to the particulars numbered 435, 172, 173, 171, 213, and 214, and these charges were taken up in that order. The total number of charges in the particulars of record was 685, and application was made at the hearing to add 8 or 10 more, which was held in suspense and ultimately so remained not disposed of. Upon one case of bribery being proved (and perhaps two) the respondent, by his counsel, admitted the responsibility for the corrupt act of an agent, and did not or could not claim the protection of the saving clause of the statute. Thereupon the Court declared

the seat vacated, and no further evidence was given—though this result was not suggested by or at the instance of the Court. Charges 213 and 214 were proved: all the others taken up failed. No costs should be given as to the failures—nor of any witnesses subpoenaed for the supplemental charges. It is said that 225 witnesses were subpoenaed and paid (in all) the sum of \$530.

This number of charges, aggregating nearly 700, appears to be excessive. The practice of heaping up particulars after this cumulative fashion should not be encouraged—unless very good proof is given of their substantiality. Many of the charges are of wholesale character, implicating many persons against whom nothing has been proved or probably can be proved.

The object of giving particulars is to enable the opponent to inquire and be prepared to meet the matters seriously charged; but this excessive multiplication of accusations would defeat that object by distracting attention, and would also occasion much trouble and expense in their investigation by the respondent.

The English and Irish Judges have strongly reprobated this overloading of the case with details which turn out to be too unwieldy to be handled at the trial or too inaccurate to stand investigation: see *Youghall Case*, 1 O'M. & H. at p. 295; *Hereford Case*, ib. 196; *Norwich Case*, 4 O'M. & H. 91; *Pontefract Case*, ib. 201; *St. George Case*, 5 O'M. & H. 89. The salutary rule is expressed in the *Waterford Case*, 2 O'M. & H., by Hughes, B., who excluded costs of all witnesses not examined. He observed that of necessity growing out of the nature of the case (the necessity being to subpoena every one who appeared to be open to the suspicion of corruption) subpoenas were served upon almost every voter on the side of the respondent. "That," he said, "was an expense which, in point of speculation, it was necessary for the petitioner to incur, but which, in point of burden, ought not to be thrown on the respondent."

The general practice appears to be in England to withhold costs in respect of cases included in the particulars of which no evidence was given at the hearing: *Ipswich Case*, 4 O'M. & H. 75; *Salisbury Case*, 3 O'M. & H. 131; *Rochester Case*, ib. 161; and *Meath Case*, ib. 193. So in *Welland Case*, 1 Ont. Elec. Cas. at p. 416; *Niagara Case*, H. E. C. at p. 575; *North Victoria Case*, ib. 704.

That rule would be rather stringent in this case, for it is to be inferred from the attitude of the respondent's counsel

that there would have been some cumulation of illegal or corrupt acts, had he not acted as he did.

The fair thing, it occurs to me, is to give a reasonably approximate apportionment of the outlay for witness fees now under consideration, and fix it, without taxation, at the sum of \$230, to be paid by respondent to petitioners.

IDINGTON, J.

NOVEMBER 4TH, 1904.

CHAMBERS.

RE HARDING.

Will—Construction—Residuary Bequest — Church—Amount more than Sufficient to Answer Specified Purpose—Application of Balance Cy-près—Intestacy—Gift for Maintenance of Burial Plot—Perpetuity—Charity.

Motion by the executors and trustees under the will of Prudence Sarah Harding for an order declaring the construction of the will.

G. F. Ruttan, Napanee, for the executors and trustees.

W. E. Middleton, for Fanny Louisa Downey, only next of kin of deceased.

A. H. F. Lefroy, for the Synod of the Diocese of Ontario.

IDINGTON, J.—The testatrix died on or about 1st June, 1904. Probate of her will, which is dated 31st January, 1896, was granted to her executors . . . on 27th June, 1904. The estate consisted of personal property of about \$10,218. Debts and funeral and testamentary expenses to about the amount of \$1,076 have been paid by the executors; and when the other liabilities (if any) and the specific legacies are paid there will, of the residue, be more than necessary to satisfy the purposes particularly named in the following paragraph, which is the last bequeathing clause, of the will, and reads thus:

"All the rest and residue of my estate . . . I will, devise, and bequeath to the rector and churchwardens of the church of St. Mary Magdalene, Napanee, in trust to use \$3,000 thereof in properly and suitably building and completing the tower of the said church, and placing therein a good, suitable, and proper bell for the use of the said church, and in trust to invest the surplus, if any, in the savings bank department of the Merchants Bank of Canada, Napanee, in the name of the rector and churchwardens of the

said church, in trust to apply the whole of the surplus in payment upon the principal of the debt upon the said church of St. Mary Magdalene, Napanee, so soon as a sum equal to the said surplus has been contributed by the members of the congregation of the said church by direct offertory (sic) towards the principal debt of the said church, and in the meantime to allow the said surplus to remain on deposit in the said bank, accumulating at bank interest."

At the date of the will there was a debt upon the church in question of about \$6,500, but this was at the time of the death of this testatrix reduced to about \$1,800. This result was brought about by the receipt of moneys which I do not think it can be reasonably said were at all likely to be present to the mind of the testatrix when she made this will. They certainly were not the "direct offertory" of the members of the congregation.

The residuary estate dealt with by the paragraph I have quoted is not (after applying the \$3,000 for tower and bell) all required for the purpose of liquidating this balance of debt, upon the basis of one-half being taken out of the residuary estate and the other half being derived from the "direct offertory" of the members of the congregation.

The question is thus raised, whether or not the surplus can, by the application of the doctrine of *cy-près*, be used for other charitable purposes of this church, or must be paid to the next of kin.

I think it must go to the next of kin.

All that can be said of this residuary gift being for charitable purposes generally, could, with much greater force, have been said of numerous other gifts that have been held to have been given for a particular purpose only, and not for charity in any and every event.

I read this part of this will as intended, next after the completion of the tower and the placing of a bell therein, as providing for the payment of the church debt, and incidentally thereto evoking a spirit of charity in the congregation.

I see no other intention. The completed church fabric, freed from debt, having been secured, the entire purpose, of or for charity, ceases.

Upon such a reading of the will there is not any room left for the application of the *cy-près* doctrine in any way to this residuary bequest.

[Re Rymer, [1895] 1 Ch. 19, and authorities reviewed by Lord Herschell at p. 27 et seq., referred to.]

The only feature of this case that seems to support the claim in behalf of the church is, that the bequest is a residuary one. Having regard to the surrounding circumstances at the time of the execution of the will, I think this must be given but little weight. It certainly is not to be inferred from the paragraph in question that the testatrix ever expected that there would be, as the result has shewn, a surplus. . . .

[*Cherry v. Mott*, 1 M. & C. 19, *Mills v. Farmer*, 19 Ves. 483, 485, and *Attorney-General for Nova Scotia v. Power*, 35 S. C. R. 182, 526, referred to.]

I think that it must be declared that so much of the residuary estate as may be necessary, with the accumulations thereof upon deposit, to pay one-half the debt of the church at the death of the testatrix, and interest thereon till the "direct offertory," within the words of the will, of the members of the congregation, has produced the other half, goes to the church under the bequest, and that in the meantime there should be deposited by the trustees a sum at least equal to one-half of the debt at the death of the testatrix, and so much more as will secure the difference between the rate of interest on deposit and that to be paid upon the debt until the "offertory" has satisfied the conditions of the will.

In regard to the balance of the residuary estate after payment of all expenses, there may, if the parties desire, be a declaration that it is payable to the next of kin.

Upon the argument a point was taken that the bequest to the rector in charge of St. Paul's church, Sandhwaft, so far as applicable to the keeping in proper care and order two burial lots in the church burial ground at the village of Adolphustown, and cutting the grass and repairing the fences and cleaning and re-lettering the monuments so as to keep the said burial plots in a neat, tidy, and orderly condition, is not valid, as it offends against the rule as to perpetuities.

I am of opinion that this part of that particular bequest is not for what the law recognizes as a charity, and therefore that if it stood alone it would be impossible to support it.

I think, however, that if it should be declared void the money necessary to fulfil it would have to go to the other objects named in the same trust, which are undoubtedly charitable objects, and as to them the rule against perpetuities does not apply: see *Hoare v. Osborne*, L. R. 1 Eq. 585, and *In re Vaughan-Thomas*, 33 Ch. D. 187. *In re Rogerson*, [1901] 1 Ch. 715, seems expressly in point.

Possibly, however, the parties would prefer to see it held as in *In re Tyler*, [1891] 3 Ch. 252, and other cases, as if the legacy for charity had been burdened with the charge to maintain the tombstone, and, if all parties consent, it may as to this small charge be, by their consent, so declared. Or possibly the parties can settle the matter amongst themselves without any formal declaration. . . .

Let the costs of all parties be paid out of the estate, and in the case of the executors and trustees as between solicitor and client.

MACMAHON, J.

NOVEMBER 4TH, 1904.

TRIAL.

FISHER v. CARTER.

Sale of Goods—Contract—Breach—Rescission—Damages.

Action for damages for the alleged breach of a contract, dated 8th July, 1903, by which defendant agreed to deliver to plaintiff three mixed car loads of staves, hoops, and headings. The contract was entered into at Grimsby, in the county of Lincoln, and a copy of the order given by plaintiff to defendant's agent was delivered by the latter to plaintiff.

G. Lynch-Staunton, K.C., and C. H. Pettit, Grimsby, for plaintiff.

W. M. Douglas, K.C., and J. Mulcahy, for defendant.

MACMAHON, J.—The correspondence shews a completed contract between the parties.

A question was raised as to whether plaintiff was only to give notice as to when the car-loads after the first one were to be shipped, or whether he was also to give notice when he required the first car.

The order read: "Mr. W. W. Carter. Ship to A. R. Fisher at Grimsby one car 1st August; terms, 1st car three months; three mixed cars . . . staves, \$7, hoops \$9.50. heading, 5½ cents; will write when to ship."

In my opinion, the first car was to be shipped by defendant at all events by 1st August, and the other two cars when plaintiff wrote to ship.

Plaintiff did not need the stock until 21st September, when he wrote asking defendant how soon he could ship to fill his order for the 3 cars. Defendant on the following day replied, "Am trying to get you off a car this week." . . . The car of stock not having arrived, plaintiff on 5th October asked defendant over the telephone when he would get the stock. . . . Plaintiff wrote on 12th October, and defendant answered on 14th, stating that the cost of manufacturing staves was as much as the price at which they were booked, and he would have to cancel the order and charge plaintiff a little higher price, and said he would . . . send a car by the first of the following week. . . .

Plaintiff went to Fesserton on 29th October and saw defendant, who said he had to cancel plaintiff's order for stock. Plaintiff wanted him to send one car at the old price, and in effect said that if that were done he would forego his right to the other two cars. Defendant would not agree to that, but said he would let him have a car of stock for which he would charge him \$11 for staves and hoops and 6 cents for heading. Plaintiff agreed to pay the prices named for a car-load, which defendant said he would ship on 3rd November, but he failed to carry out his promise.

On 20th November defendant telegraphed plaintiff: "Can load car Monday at prices agreed. Shall I ship?" . . . Plaintiff did not reply. . . .

I find that plaintiff did not agree to a rescission of the old contract, and even had he orally agreed to rescind, there was no contract entered into on the part of defendant sufficient to satisfy the Statute of Frauds binding him to supply the one car-load at prices he had named. . . .

[Reference to Benjamin on Sales, sec. 218; Moore v. Campbell, 10 Ex. 323; Noble v. Ward, L. R. 1 Ex. 117, L. R. 3 Ex. 135.]

In the present case the alleged agreement to rescind was after breach.

A small car would contain 16,000 staves, 1,000 sets of headings, and 6,000 hoops. The largest cars have a capacity of about 28,000 staves, 16,000 sets of headings, and 10,000 hoops . . . and plaintiff is entitled to recover damages on the basis of the quantities which could be shipped on one small and two average sized cars. . . .

Judgment for plaintiff for \$298 with costs on High Court scale.

BRITTON, J.

NOVEMBER 5TH, 1904.

TRIAL.

CAMPBELL v. MORANG CO.

Master and Servant — Contract of Hiring — Publication of School Books by Master—Production and Adaptation by Servant—Original Work—Property and Benefit of Master —Injunction.

Action for an injunction restraining defendants from printing, publishing, selling, dealing in, or circulating certain educational books, of which plaintiff alleged that he was the author, known as "Our Home and its Surroundings" and "Our Earth as a Whole."

A. J. Russell Snow and C. B. Nasmith, for plaintiff.

J. H. Moss, for defendants.

BRITTON, J.—Plaintiff is an author and was a publisher of school and educational books, and defendants now carry on the business of publishers. . . .

Plaintiff alleges that in or about the month of April, 1900, an agreement was made between him and defendants, acting by George N. Morang, their president and managing director, that plaintiff should organize an educational department in connection with defendants' business, and that he was to be adequately remunerated therefor—the basis of such remuneration to depend largely upon the success of the undertaking—and that, in the meantime, until some definite arrangement should be come to, plaintiff was to be advanced the sum of \$15 each week.

Defendants deny that there was any such agreement, and allege that, on the contrary, plaintiff entered into the employment and service of defendants at the fixed salary of \$15 a week, with the statement by Mr. Morang that if plaintiff's services proved valuable and if he was retained, the question of increasing his salary would be considered. . . .

Plaintiff and Mr. G. N. Morang came together in April, 1900. Plaintiff says that he suggested that defendants should take up school book business, and that he, plaintiff, would shew defendants how to break up "the combine" which plaintiff alleged then existed in publishing school

books in Ontario. Plaintiff says that to this end the educational department in defendants' business, with plaintiff at the head of it, was established.

The fact that plaintiff, at the start, was to get \$15 a week, puts the case altogether outside of the ordinary one where, from the mere doing of useful work for a stranger in his business, a promise to pay would be implied, and to pay what such work would be reasonably worth.

No doubt plaintiff expected to get more than the \$15 a week, but he expected it because he supposed that some new definite bargain would be made.

Plaintiff continued, as he puts it, in defendants' service without any bargain. Is plaintiff in a position to say that he must now recover upon a quantum meruit, and so virtually be placed in as good a position as if defendants had made an agreement and had made it in accordance with plaintiff's offer? What plaintiff did was in the course of his employment. It does not seem to me material whether plaintiff or Mr. Morang is right as to the educational department being then first organized. . . .

In November, 1900, plaintiff asked for more money, and was allowed \$20 a week. This amount he received weekly until November, 1902. On 29th April, 1901, realizing that there was no agreement beyond that of the weekly allowance, plaintiff says he wrote to Mr. Morang a letter, of which plaintiff kept and produced at the trial a copy. Mr. Morang has no recollection of ever having received such a letter, and he cannot find any such. There is no corroboration of plaintiff's evidence of that letter or its receipt by Mr. Morang. Suppose it was received, it was only a proposition that an arrangement be made on "something like the following basis:"—

1. Educational department to be kept separately.
2. Defendants to pay the \$20 a week.
3. Defendants to pay plaintiff 20 per cent. on profits when the profits of the department amount to more than \$5,000 per annum.
4. Defendants to pay plaintiff a royalty of 5 per cent. on all books prepared by him or in which a large proportion of the work was plaintiff's.

There was no reply to that letter. Mr. Morang says that plaintiff in conversation spoke about getting royalty, but

he, Morang, replied that he would not pay royalty—"would not think of it."

Although there was no reply to that letter, and no satisfaction when the matter was referred to in conversation, plaintiff did not follow the matter up, but continued to accept the \$20 a week down to November, 1902, when he asked for more money, and Mr. Morang agreed to give him \$125 a month. Plaintiff says this was increased "advance" on account. Mr. Morang says it was simply an increase of salary, he being always willing to treat plaintiff liberally. This continued until May, 1903, when plaintiff's services were dispensed with.

According to the evidence of Mr. Morang, plaintiff made no complaint except that he should get a month's notice or a month's additional pay in lieu of notice. Defendants gave to plaintiff pay for the additional month, intending it to be in full, and in corroboration of the evidence for the defence upon that point the cheque is produced, dated 18th May, 1903, for \$125 "in full to date." Plaintiff says it was understood that the receipt of this cheque was not to prejudice his claim. Defendants say there was no such understanding, and further that plaintiff was not then putting forward any further claim.

In determining, upon the evidence of plaintiff and Mr. Morang, what the bargain really was, the ability, habits, and resources of plaintiff, at the time of his application for employment, are important factors. The evidence as to these gives a needed explanation of why such an engagement as Mr. Morang states, should be accepted, and gladly accepted, by plaintiff. Fair inferences in corroboration of Mr. Morang's evidence may be drawn from the letters of plaintiff. . . .

The publication of the geographies as set out in the statement of claim may be accepted as substantially correct. Plaintiff was a consenting party to the agreement between defendants and the MacMillan Co., New York, for the publication in Canada of the school geographies based on the text of Tarr and McMurray's geographies—and these were to be published by defendants after they were made by plaintiff's work suitable for Canadian schools. So plaintiff cannot now be heard to complain of defendants doing whatever may be necessary to carry out that agreement. Defendants are bound to pay a royalty to the MacMillan Co. on these books. I find, upon the evidence, that the copyright of the new or original work of plaintiff in these books, so far as it

is the subject of copyright, belongs to defendants as proprietors, within the meaning of sec. 18 of the Copyright Act, 1842. This seems to me a case where the inference may be fairly drawn that the copyright, so far as there was any copyright in plaintiff's work, was intended to belong to defendants as publishers and proprietors of the books. See *Lawrence v. Aflalo*, [1904] A. C. 17.

Defendants discontinued the use of plaintiff's name, and it did not appear in the edition published in 1904; and they say they do not intend to use his name as to any future edition.

Defendants are entitled to sell any of the books on hand of the editions of 1901, 1902, and 1903, in which are printed on the title page the words "Revised and adapted for Canadian schools by W. C. Campbell, author of *Modern School Geography*," etc.

Action dismissed with costs.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING NOVEMBER 12TH, 1904.)

VOL. IV. TORONTO, NOVEMBER 17, 1904. No. 12

NOVEMBER 5TH, 1904.

DIVISIONAL COURT.

BESSEMER GAS ENGINE CO. v. MILLS.

Company—Extra-provincial Corporation—Sale of Goods in Ontario without License — Resident Agent — Action for Price—Dismissal—Costs.

Action in the County Court of Lambton to recover the price of a gas engine sold and delivered by plaintiffs to defendant and accepted by defendant, and the sum paid by plaintiffs for freight and duty.

Plaintiffs were a foreign corporation, having their head office in the State of Pennsylvania, and defendant was an oil operator residing in the township of Sarnia, in the Province of Ontario.

On 6th June, 1903, plaintiffs wrote to one W. H. Fogle, an oil operator residing near defendant, authorizing Fogle to sell their engines at certain prices specified in a price list furnished to him; they agreed to allow him a discount of 10 per cent. from the prices therein set forth, and they asked him to take great care to sell only to responsible persons.

On 10th September, 1903, Fogle sold an engine for plaintiffs to defendant at the schedule price, and wrote to them asking them to send it at once, which they did. After using it for some time, defendant complained of its work, and endeavoured to get plaintiffs to make a reduction from the price, which they refused to do. They then brought the present action, and defendant set up several defences to it. He denied any contract with plaintiffs, and alleged that he had purchased from Fogle; he alleged that the engine had been unskilfully set up by Fogle, and claimed \$175 damages by reason of the manner in which it had been set up; he disputed the contract price claimed by plaintiffs; and he set

up that plaintiffs were an extra-provincial corporation, and, not having taken out a license under 63 Vict. ch. 24 (O.), were disentitled from recovering under sec. 14 of that Act.

The jury found in plaintiff's favour as to the price claimed by plaintiffs, and against defendant upon his claim for damages. The County Court Judge found all the other questions in plaintiffs' favour, and directed judgment to be entered for them for \$308.17 and costs.

Defendant appealed. His appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

W. J. Hanna, Sarnia, for defendant.

W. R. Riddell, K.C., for plaintiffs.

STREET, J.—It was not disputed either at the trial or before us that plaintiffs are an extra-provincial corporation, within the meaning of 63 Vict. ch. 24, and that W. H. Fogle is a resident of this Province, and that plaintiffs had not obtained a license.

The bargain between Fogle and defendant was made in the county of Lambton at Fogle's place, and he wrote to plaintiffs to send an engine to him to fill the bargain, and this was done and the engine was delivered by Fogle to defendant at his wells in the county of Lambton.

The 14th section of the Act provides that so long as any extra-provincial corporation remains unlicensed under the Act, it shall not be capable of maintaining any action in any Court in Ontario in respect of any contract made in whole or in part within Ontario, in the course of or in connection with business carried on contrary to the provisions of sec. 6 of the Act.

Section 6 provides that no extra-provincial corporation shall carry on within Ontario any of its business unless and until a license has been granted to it; and no agent or other person shall as the representative or agent of any such corporation carry on any of its business in Ontario unless and until such corporation has received such license: provided that taking orders for or buying or selling goods by travellers or by correspondence, if the corporation has no resident agent or representative, or no office or place of business in Ontario, shall not be deemed a carrying on of business within the meaning of the Act.

I think it is plain from an examination of these sections that the Legislature have forbidden extra-provincial corporations which have not taken out a license, selling their goods in this Province except under the circumstances mentioned

in the proviso to sec. 6. I do not think the facts bring the case within that exception. Fogle, who made the sale, was a resident agent, in my opinion, within the meaning of the proviso; he says in his evidence that he never went out to solicit orders, but took only those which came to him at his place of business. He was clearly authorized in writing by plaintiffs to sell their goods at fixed prices upon commission. There was, therefore, a contract made orally in Ontario and completed by delivery of goods and part payment, contrary to the provisions of the 6th section of the Act, and plaintiffs, having admittedly no license, cannot maintain an action.

Appeal allowed with costs, and judgment to be entered in the Court below for defendant upon the issue upon which he has succeeded, with such costs as he would have been entitled to had that been his only defence. Plaintiffs are entitled to have the other issues found in their favour with the costs of them, and to set off such costs against defendant's costs of defence. The action will be dismissed, but without prejudice to plaintiff's right to bring another action, as permitted by sec. 14 of the Act, in case they shall take out a license under the Act.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., concurred.

MEREDITH, J.

OCTOBER 25TH, 1904.

TRIAL.

ARMSTRONG v. BRUCE.

Surgeon—Malpractice—Aseptic Surgery—Injury to Patient by Mistake of Nurse in Preparing for Operation—Responsibility of Surgeon for Nurse.

This was an action for alleged malpractice, the plaintiff alleging that defendant, a surgeon, had negligently directed the nurse to fill with boiling water a "Kelly pad," upon which plaintiff was placed while an operation was performed upon him under the influence of anæsthetics by defendant. His back and shoulders were burned by the pad.

At the opening of the case MEREDITH, J., decided to dispense with the jury, following *Town v. Archer*, 4 O. L. R. 383, 1 O. W. R. 391.

The nurse swore that she had been directed by defendant to fill the Kelly pad with boiling water. This, however, was

denied by defendant and the other two medical men who were present, who all said that the nurse had been directed to place the instruments in boiling water and to fill the Kelly pad with *hot water* in the same way as a hot water bottle. A number of surgeons were called by defendant, who all agreed in saying that when an operation is to be performed aseptically it would be gross negligence for the operating surgeon to touch anything which had not been sterilized, that it is his duty to sterilize his hands with great care, and thereafter to touch nothing which had not been itself sterilized. They all agreed that the proper heat of water to put in a hot water bottle is a matter of familiar knowledge amongst nurses, that that is a matter which they are carefully taught in hospitals, that it would be impossible for the operating surgeon to attend to the details, and that he must trust to the knowledge of trained nurses. One of the witnesses, Dr. Bingham, said, "If I cannot trust my nurse, I must give up aseptic surgery."

Amongst the witnesses examined were Drs. Bingham, Ross, J. Caven, Cameron, Lawson, and Hall; and there was no evidence at variance with the above. It was further proved that it is a matter of the utmost importance in an operation such as this was, viz., strangulation of the intestine advanced to the gangrenous stage, that not a moment should be lost, and that the hope of recovery is practically in the inverse ratio to the length of time taken in the operation.

There had been a charge on the pleadings that the defendant had not been skilful in the operation which was actually performed, but this was practically abandoned; and all the medical witnesses stated that the operation could not have been more carefully or skilfully performed.

T. J. Blain, Brampton, for plaintiff.

W. R. Riddell, K.C., and W. Mulock jun., for defendant.

Perionowsky v. Freeman, 4 F. & F. 977, and Town v. Archer, 4 O. L. R. 383, and the cases therein cited, were referred to.

MEREDITH, J.—Plaintiff sustained a very painful injury, and one which has caused him some loss. These facts do not necessarily entitle him to relief from defendant. In order to have damages in this action he must satisfy the Court that defendant has been guilty of some actionable negligence. Defendant is a skilled gentleman, a gentleman of the medical profession, and what would in an ordinary in-

dividual be but mere negligence would in his case, no doubt, be gross negligence. Had he done that which the nurse testifies that he did, it would, in my judgment, have been gross negligence. Whether I should be obliged to say that the injury which plaintiff sustained was the natural effect of that negligence is another question, and one which I need not determine. What I have now to find is whether plaintiff has affirmatively shewn that there was negligence on the part of defendant occasioning the injury of which he complains.

I am unable to find upon the evidence that the nurse's statement is accurate. She is, I think, quite mistaken as to the direction proceeding from defendant in regard to the filling of the pad. I am satisfied that she has confused that which he said in regard to sterilizing his instruments with that which he said in regard to filling the pad. I have no manner of doubt that if the doctor had said to any experienced nurse that she was to fill that pad with boiling water, it would at once have struck her as an extraordinary thing, and one calling for some explanation. Nothing of that sort took place. It was a thing that could not have been done by Dr. Bruce, unless through a slip of the tongue. He never meant that she should do that which she did. So that the probabilities are altogether against the story of the nurse. And the direct testimony very greatly preponderates in favour of defendant. We have Dr. Bruce's own statement, which is worthy of at least as much credence as that of the nurse. No doubt every one is naturally prejudiced in his own favour in a case of this kind, and Dr. Bruce's action in saving himself against a charge of negligence may be to some extent affected by his interest. On the other hand, the nurse is saving herself from a charge of negligence, and possibly an action for the recovery of damages. They stand upon an equal footing as far as that is concerned. Then there is the testimony of the other two medical gentlemen, who say that the nurse is mistaken. Upon the whole I find that the direction to fill the pad with boiling water was not given, but the direction was given to fill it as if it were a hot water bottle, and, if that be so, plaintiff's case seems to me to fall to the ground. I cannot find any negligence in Dr. Bruce having, under the circumstances, assumed that the nurse would perform her duties properly. I cannot think that upon this branch of the case anything like a case is made out for plaintiff. It is not contended that liability arose by reason of any relationship of master and servant having existed between defendant and the nurse. The facts would not support any such contention. There was no such relationship.

The only question which causes me any trouble is as to the disposition of the costs. That is always more or less a perplexing question. The law, in its wisdom, has placed the disposition of the costs in the discretion of the Judge. I had much rather such discretion did not devolve upon me. Plaintiff certainly has suffered, suffered without any fault on his part. It looks very much as if he has no substantial remedy in respect of his sufferings through the negligence of another, or others. He brought his action relying upon the statement of the nurse that Dr. Bruce had done that which she has sworn to; it was not launched upon any knowledge of his own. He was insensible at the time, unable to preserve himself from the injury which this pad caused, and unable to know what directions were given. Under all the circumstances of the case, I think I am fairly exercising my discretion in making no order as to costs of the action.

The action is dismissed without costs if the case go no further. If it go further, dismissed with costs.

ANGLIN, J.

NOVEMBER 10TH, 1904.

WEEKLY COURT.

CITY OF TORONTO v. TORONTO R. W. CO.

Street Railways—Agreement with Municipal Corporation—Construction—Operation of Railway—Right of Municipality to Direct—Service—New Lines—Extension of Municipal Boundaries—Time Tables and Routes—City Engineer—Night Cars—Open Cars—Heating Cars—Specific Performance—Special Case—Costs.

In this action issues were raised which involved the determination of the respective rights of plaintiffs and defendants as to a number of matters affecting the operation of defendants' railway. The solution of many of the questions as to which the parties differed depended upon the true construction of several provisions of the agreement under which defendants acquired the right to operate the railway.

This agreement, including certain incorporated documents, was ratified and confirmed by Act of the Ontario Legislature, 55 Vict. ch. 99, and is to be found printed as a schedule to that statute. To dispose as far as possible of such questions the parties agreed to submit to the Court a special case in the following terms:—

The parties desire, before proceeding to take further evidence in this case, to obtain the opinion of the Court upon certain questions of law arising on the construction of the

agreement on which the action is brought. These questions are:—

Is the city or the railway company, and which of them, on the proper construction of the agreement, entitled to determine, decide upon, and direct:—

1. What new lines shall be established and laid down and tracks and service extended thereon by the company, whether on streets in the city as existing at the date of the agreement or as afterwards extended?

2. What time tables and routes shall be adopted and observed by the company?

3. Whether, if so determined by the city engineer, with the approval of the city council, cars which start before midnight must finish the route on which they have so started, though it may require them to run after midnight?

4. At what time the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars shall be provided with heating apparatus and heated?

5. In the event of the decision of the Court being in favour of the city on any of the above questions, is the city entitled to a decree for specific performance as to the matter so decided or in any and which of them?

6. Is the privilege to the city to grant to another person or company, for failure of the company to establish and lay down new lines and to open same for traffic or to extend the tracks and services upon any street or streets as provided by the agreement, the only remedy the city can claim?

C. Robinson, K.C., and J. S. Fullerton, K.C., for plaintiffs.

W. Cassels, K.C., and J. Bicknell, K.C., for defendants.

ANGLIN, J.—In approaching the consideration of the agreement and incorporated conditions, I fully accept the proposition with which Mr. Cassels opened his argument, viz., that to manage defendant company and its undertaking is the right and the duty of its directors. But, inasmuch as this company exists for the purpose of operating the Toronto railway under a public franchise, it must be self-evident that, in regard to matters within their scope, the terms and conditions upon which the franchise itself is held must govern the exercise of the rights which it confers. To these terms and conditions in such matters the management and control of the directorate of the defendant company must conform. To that extent their independence of action is restricted—their right of control is qualified.

The agreement under consideration is in substance the grant for a lengthened term of valuable rights upon the streets of the city of Toronto: the conditions incorporated in it are the terms upon which defendants sought and acquired those rights. These documents must be taken to have been intended adequately to provide for the operation of a street railway in a large and rapidly growing city, and to ensure a service suited to its wants and satisfactory to citizens of reasonable expectations. Consistently with these requirements, it must be assumed that both parties contemplated an arrangement reasonably advantageous to defendants as a commercial corporation. The agreement and conditions must be read in the light of these facts and in a broad and liberal spirit, the particular provisions being construed so as best to effectuate these general purposes, where the language employed fairly permits of such construction.

That both parties had in view a single system of surface street railways for the entire city of Toronto for a period of 30 years is abundantly plain; . . . both, dealing not with the conditions of the moment, but with the privileges to be enjoyed and services to be rendered for a period of 30 years, must be taken to have intended by the words "in the city of Toronto" whatever that phrase might describe at any time during such 30-year period.

I have no doubt that the provisions of this agreement, onerous as well as advantageous, were meant to apply and do apply to extensions of the city during the term of the agreement.

Upon examining the provisions of the conditions with regard to the matters covered by the first and the second questions of the special case, a striking contrast is apparent between clause 14, which, in regard to new lines, not only requires the approval of the city engineer's recommendation by the city council, but also that the period within which such recommendation should be carried out by the company shall "be fixed by by-law to be passed by a vote of two-thirds of all the members of the city council," and clauses 26, 27, and 28, under which the city engineer is to determine certain other matters subject only to "approval by the city council," presumably by a vote of a majority of the members present not being fewer than a quorum. Why this difference? Why such provision at all, if the company is itself entitled to decide what shall be done in respect to matters covered by these clauses?

The city engineer appears to hold, in regard to the parties to this agreement, a position not unlike that held by the

architect between the owner and the contractor under familiar provisions of building contracts. For the protection of the company the agreement makes the recommendation or the determination of the city engineer a pre-requisite to anything being demanded of the company. In the case of new lines and extensions defendants are further protected by the provision that a by-law passed by a vote of two-thirds of all the members of the council shall fix the period within which the company will be required to carry out such recommendation.

Under clause 14, which governs the matters covered by the first question, it is the city council approving, and, by by-law passed by a vote of two-thirds of its members, fixing the time for compliance by the company with, a recommendation of the city engineer, which may "determine, decide upon, and direct what new lines shall be established and laid down and tracks and service extended thereon by the company, whether on streets in the city as existing at the date of the agreement or as afterwards extended."

Question 2 relates to time tables and routes. It is impossible to answer this question categorically. In respect to matters covered by clauses 26, 27, and 28 of the conditions, neither the city nor the company is entitled to "determine, decide upon, and direct." It is the city engineer who has this right and duty; but his determination, before the company can be required to recognize or act upon it, must be approved by the city council.

Reading clauses 26, 27, and 28 of the conditions together, and having regard to the tenor of the whole agreement, I think . . . that both time tables and routes are within their purview. The city engineer cannot satisfactorily or efficiently exercise his right to determine speed, service, and intervals between cars, unless he also possesses power to decide upon and fix routes. His right to determine, with the approval of the city council, the "service" necessary upon all lines is unrestricted, and is quite wide enough to include the power to specify the routes to be established and maintained. Given the routes and the condition (No. 27) fixing the hours of starting and finishing the daily runs, the making of time tables is nothing more than a convenient method of exercising the right to determine speed and intervals. . . . These powers should not be used in an arbitrary or unreasonable manner. Some sound discretion as to what is proper and reasonable may naturally be expected. . . . Upon the fair exercise of that discretion those who were in charge

of the interests of defendants when this agreement was framed, seemed to have been fully prepared to rely.

The 3rd question has caused me some difficulty. Provision is already made, by a judgment of this Court, . . . for transfers from day to night cars and vice versa. Fares on night cars are double the ordinary maximum single rate fares (clause 30). By sec. 17 of the statute . . . "the fare of every passenger shall be due and payable on entering the car . . ." Clause 27 of the conditions provides that "day cars are to commence running at 5.30 a.m. and to run until 12 o'clock midnight." There is nothing to prevent the city engineer, under clause 28, requiring night cars to be provided in such numbers and running upon such routes and at such intervals as may be requisite to carry to their destination all passengers who may be unable to finish their journeys in day cars. He may so arrange his time tables that all day cars will "run in" from transfer points. I can find nothing in the agreement itself, or in the working out of its provisions as to day and night cars, which would enable me to say that it entitles the city to require the company to run, after midnight, any car which, having started as a day car, cannot in due course finish its route by that hour.

This is a matter in respect to which, by the exercise of a little good sense, an arrangement satisfactory to both parties could readily be made. As the fare is, by statute, payable on entering the car, and the company is bound to transfer passengers from day to night cars, an arrangement that all cars on the road at midnight should eo instanti cease to be day cars and, becoming night cars, should as such continue their routes, and that all passengers entering such cars after midnight should pay 10 cent fares, would probably meet the requirements of both parties, and should present no greater difficulty in operation than the practice prevailing in regard to limited tickets. The 3rd question . . . however, must be answered as contended for by counsel for defendants.

If required to say by what test or in what manner the proper authority is to determine when the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars should be provided with heating apparatus and heated, I might find it difficult to answer. These, however, are, in my opinion, matters of "service" within the purview of condition 26, and the city engineer is authorized thereby to determine them with the approval of the city council.

With regard to the 5th question, counsel for plaintiffs virtually conceded that, unless I felt at liberty, in view of the decision of the Court of Appeal in England in *Wolverhampton v. Emmons*, [1901] 1 K. B. 515, to decline to follow the decision of our own Court of Appeal in *City of Kingston v. Kingston Electric R. W. Co.*, 25 A. R. 462, this question must be answered in the negative. That this latter decision is in point could not, I think, be successfully controverted. But for a recent enactment of the Ontario Legislature, I might, upon the authority of *Trimble v. Hill*, 5 App. Cas. 342, 344, if I thought this case within the principles enunciated in *Wolverhampton v. Emmons*, have followed that decision. But, in my opinion, sec. 81 of the Ontario Judicature Act (R. S. O. 1897 ch. 51) obliges me to follow the decision of the Ontario Court of Appeal, notwithstanding any later expression of opinion in any English Court except the Judicial Committee of the Privy Council. . . . I answer the 5th question in the negative.

To answer the 6th question affirmatively would be in effect to declare that having covenanted . . . "to establish and lay down new lines and to extend the tracks and street car service as may be from time to time recommended by the city engineer," etc. (condition 14 and clause 12 of the agreement), the company nevertheless may at any time elect, in lieu of performing their covenant, to forfeit their exclusive rights to the extent provided by condition 17. A not improbable consequence would be that the company would from time to time refuse to lay down tracks upon streets in sparsely populated outlying districts. Upon these streets, far distant one from another, no person or company could be found willing to undertake the operation of isolated lines of street railway. No rival system could be established, and, if it could, all the advantages of the single system throughout the city contemplated by the arrangement between the city and the company would be lost to the former. It is impossible to believe that the parties intended that the company should enjoy an option so entirely inconsistent with the manifest object and general tenor of the bargain which they made. Nor do I think any rule of construction requires me to hold that the city relinquished, for such an illusory and shadowy alternative right, whatever substantial redress it would otherwise be entitled to claim for breaches of obligations which may be imposed upon the company under the provisions of condition 14. To question 6 I therefore make answer that "the privilege of the city to grant to another person or company, for failure of the city to establish and

lay down new lines and to open them for traffic or to extend the tracks and service upon any street or streets as provided by the agreement, is not the only remedy the city can claim."

The special case is silent as to costs. To prevent future difficulty, however, so far as Rule 1130 enables me to do so, I direct that the costs of and incidental to this special case be costs in the cause.

ANGLIN, J.

NOVEMBER 7TH, 1904.

TRIAL.

MENDELS v. GIBSON.

Mortgage—Action on Covenant for Payment—Attempted Exercise of Power of Sale—Incomplete Sale—Inability to Re-convey—Change in Position of Property.

Action by mortgagee against mortgagor to recover, upon the covenants contained in a chattel mortgage on a cheese factory plant and equipment, the sum of \$700, with interest and costs. This mortgage was held as collateral security to a mortgage upon the factory site.

J. A. Allan, Perth, for plaintiff.

R. C. McNab, Renfrew, and J. A. Stewart, Perth, for defendant.

ANGLIN, J.—The defence of the mortgagor rests entirely upon the legal effect of an alleged exercise of the powers of sale contained in both mortgages, and a series of transactions affecting the mortgaged property, which ensued. These defendant puts forward: (a) as a defence to any claim to enforce the covenants in question; (b) as entitling him to credit for the sum at which the plaintiff agreed to sell the mortgaged property.

To make clear the nature of these defences, it is necessary to briefly state the circumstances which accompanied and followed the sale alleged to have been made by plaintiff.

Having previously attempted unsuccessfully to sell, plaintiff in August, 1902, without the concurrence of defendant, entered into an agreement with one Mitchell for the sale to him of the entire mortgage security—site, factory, equipment, and plant—for the sum of \$750, payable in instalments, of which the first, amounting to \$100, fell due on 1st May, 1903. No cash deposit was required. The purchaser covenanted to pay the purchase money as stipulated, and the

vendor covenanted upon payment to convey. The agreement gave the purchaser the right of immediate possession to continue until default in payment, subject to impeachment for voluntary or permissive waste. Mitchell took actual possession about 1st March, 1903. He subsequently made an oral agreement for sale of the premises and plant to a creamery company, for \$1,250, payable \$150 in stock of the company and \$1,100 in cash, within two weeks. The creamery company paid nothing to Mitchell at the time, nor have they since paid him anything. They, however, caused the plant and equipment of the cheese factory to be taken out and the factory itself to be taken down, and removed the whole to Dacre, a village some six miles distant from Mount St. Patrick, where it still remains. Mitchell swears that he was wholly unaware of this dismantling of the property.

Mitchell has paid no part of his own purchase money to plaintiff, and apparently no attempt has been made to compel him to make payment. Though no definite agreement has been come to between plaintiff and Mitchell for the abandonment or cancellation of the contract, Mitchell appears to have no intention of carrying it out, and plaintiff seems to have no idea of endeavouring to compel him to do so, probably because of the financial inability of Mitchell, suggested in argument, but not established by any evidence.

The contract for sale to Mitchell and the giving to him of possession do not amount to an exercise of his power of sale by plaintiff sufficient to extinguish the defendant's equity of redemption: *Bank of Upper Canada v. McLeod*, 16 Gr. 280. This precludes any disposition of the action on the footing of a completed sale to Mitchell, entitling defendant to credit on a cash basis for its proceeds.

The right of defendant to redeem still subsisting, plaintiff remains mortgagee, and, his mortgages being in default, is, if in a position to reconvey upon payment, entitled to a judgment to enforce defendant's covenant. It is obvious that plaintiff cannot now reconvey the security as it was when he took possession or when he gave possession to Mitchell. Is the plaintiff so far accountable for the present position of the mortgaged premises that his consequent present inability to reconvey should be a bar to his recovery in this action? In my opinion, he is not entitled to recover upon the covenant of the defendant unless within a reasonable time he can put himself in a position to reconvey the mortgaged property substantially restored to its former condition, i.e., with the factory re-erected and the plant and equipment re-installed: *Re Thuresson*, 3 O. L. R. 271, 1 O. W. R. 4.

There is evidence that the mortgaged property, even if replaced in its former position, will be found much damaged and deteriorated by exposure and want of proper care. This is something which I cannot dispose of at present.

The plaintiff having come to the Court unable to perform a condition, fulfilment of which is necessary to entitle him to the relief he asks, should not expect a judgment more favourable than that which, following *Re Thuresson*, I feel bound to pronounce.

Judgment will, therefore, go dismissing this action with costs, unless within one month plaintiff brings into the office of the local Master at Perth, to whom there will be a reference for that purpose, evidence that he has put himself in a position, upon payment, to restore to defendant the mortgaged property, substantially as it was when plaintiff took possession. If plaintiff within one month satisfies the Master that he can fulfil this requirement, the Master will proceed to consider what allowance (if any) should be made in respect of deterioration or depreciation of the mortgaged property attributable to the dealing had with it for which plaintiff has been held responsible. The amount of such allowance, and the costs of this action, must then be deducted from plaintiff's claim as stated in the amended statement of claim (subject to the taxation by the said Master of the sum of \$107.96 claimed for costs of certain sale proceedings). The Master will report the balance due plaintiff after making the deductions above directed. Costs of the reference and further directions will be reserved.

CARTWRIGHT, MASTER.

NOVEMBER 8TH, 1904.

CHAMBERS.

CANADIAN INTERNATIONAL MERCANTILE
AGENCY v. INTERNATIONAL MERCANTILE
AGENCY.

*Security for Costs—Application for Payment out of Court—
Foreign Receiver.*

Motion by plaintiffs for an order requiring the receiver of defendants to give security for plaintiffs' costs of a motion made by the receiver for payment out of Court of \$860 which formerly stood to the credit of defendants in a bank,

and were paid into Court by the bank. The defendants and the receiver were out of the jurisdiction.

Grayson Smith, for plaintiffs, relied on *Re Parker*, 16 P. R. 392, and cases there cited.

C. S. MacInnes, for receiver.

THE MASTER.—Mr. MacInnes argued that the present case was distinguishable from *Re Parker*, as there the executrix was herself the actor, and so was properly ordered to give security; but here the receiver should have been made a party defendant to the action, and submitted to be so made now, if necessary.

Mr. Smith declined to go into any such question at present, stating that he was prepared to meet the argument at the proper time.

I think this case is not distinguishable from *Re Parker*.

The receiver must give security within 10 days, either by bond for \$100 or payment into Court of \$50. If the security is given, the costs of this motion will be in the cause.

If security is not given, then the costs of this motion will be to plaintiffs in any event.

WINCHESTER, Co.J.

NOVEMBER 8TH, 1904.

RE PALMERSTON PACKING CO.

ALLAN'S CLAIM.

*Sheriff—Seizure of Company's Property under Execution—
Interruption by Winding-up Order—Right to Fees and
Poundage—Rule 1190.*

The sheriff of the county of Wellington made a preferential claim upon the assets of the company in liquidation of \$16.47 for fees, mileage, seizure, etc., and \$108.70 for poundage on \$2,623.26, total \$125.17, in an action of *Brown v. Palmerston Pork Packing Co.*

The claim came before WINCHESTER, Co.J., acting as a special referee under an order made pursuant to the Dominion Winding-up Act.

H. M. Mowat, K.C., for claimant.

D. Henderson, for liquidator.

WINCHESTER, Co.J.—It appears that on 3rd April, 1903, under a writ of execution issued in Brown's action, the sheriff seized part of the personal estate of the defendants at Palmerston, at the request of plaintiff's solicitor. A bond was given by two of the directors of the defendant company for the safety of the goods seized, and thereupon the sheriff went out of possession.

Nothing further has been done in the matter owing to the liquidation of the company.

A petition for an order under the winding-up Act was duly served upon the company on 10th March, 1903, and from time to time enlarged at the request of the parties interested until 29th December, 1903, when an order for the winding-up of the company was made.

The sheriff at the time of the seizure was informed that liquidation proceedings had been taken against the company.

Counsel for the claimant contends that he is entitled to be paid at least a quantum meruit under Rule 1190, which provides that "where the personal estate, except chattels real, of the judgment debtor is seized or advertised on or under an execution, but not sold by reason of satisfaction having been otherwise obtained, or from some other cause, and no money is actually made by the sheriff on or by force of such execution, the sheriff shall be entitled to the fees and expenses of execution and poundage only on the value of the property seized, not exceeding the amount indorsed on the writ, or such less sum as the Court or a Judge may deem reasonable;" and a number of cases were cited in which the sheriff was held to be entitled to be paid certain sums for poundage; and that sec. 66 of the Winding-up Act provided for the payment of such costs.

Counsel for the liquidator contends that the sheriff made seizure after the petition for liquidation was presented, and did nothing further, and that therefore he is not entitled to make a claim.

Section 66 of the Winding-up Act provides that there shall be "no lien or privilege for the amount of any judgment debt by the issue or delivery to the sheriff of any writ of execution or by levying upon or seizing under such writ the effects or estate of the company, but this section shall not affect any lien or privilege for costs which the plaintiff possesses under the law of the Province in which such writ was issued." Had the proceedings for the winding-up been taken by virtue of the writ in question, there can be no doubt that the costs in connection therewith would be payable out of the estate, but such was not the case—the proceedings had

been taken before the writ was acted upon—and, had the sheriff not withdrawn, the Court would have, no doubt, restrained him from proceeding under sec. 13 of the Act. Section 17 provides that “every attachment or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void.” In *Royle v. Busby*, 6 Q. B. D. 171, it appears that the sheriff seized goods of a company on 31st July, 1879, and a petition to wind up the company was presented on 26th July, 1879, an order made on 7th November following, ordering the company to be wound up, and the sheriff’s officer continued in possession until 17th November, when he was served with a copy of the winding-up order; it was held that he was not entitled to any fees, the execution proving abortive. It was contended that until the winding-up order was made there was always the chance of the petition being dismissed, and therefore the levy and possession, at all events up to the date of the winding-up order, were beneficial to the creditors, in the sense that they conferred on them the chance of reaping the fruits of their *fi. fa.*, but Lord Selborne, at p. 176, said: “In the present case the judgment debtor was a joint stock company, against which there was pending, when the execution issued, a petition to wind-up, on which a winding-up order was afterwards made. The effect of that winding-up order was to defeat the execution, by the operation of sec. 163 of the Companies Act, 1862.” See also the judgment of Mr. Justice Oslar in *Shaver v. Cotton*, 23 A. R. at p. 435.

In my opinion, Rule 1190 does not apply to entitle the claimant to poundage on the execution in question. His other fees will no doubt be paid by the execution creditor and added to the claim. I therefore disallow the claim without costs.

NOVEMBER 12TH, 1904.

DIVISIONAL COURT.

RE VILLAGE OF SOUTHAMPTON AND COUNTY OF
BRUCE.

*Municipal Corporations — County By-law — Alteration of
Boundaries of Local Municipalities — Misdescription —
Petition—Notice—Waiver—Arbitration and Award—Mo-
tion to Quash By-law—Application by Minor Municipality.*

Appeal by corporation of village of Southampton from
order of MACMAHON, J., 3 O. W. R. 729, 8 O. L. R. 106, dis-

missing motion to quash by-law No. 480 of the county of Bruce, detaching from the village of Southampton certain lands forming part thereof, and annexing them to the adjoining township of Saugeen.

D. Robertson, Walkerton, and G. H. Kilmer, for the village corporation.

J. H. Scott, Walkerton, for the county corporation.

W. E. Middleton, for the corporation of the township of Saugeen and certain individuals made respondents.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), was delivered by.

STREET, J.—Under sec. 18 of the Municipal Act, 3 Edw. VII. ch. 19, when an application is made to a county council to detach a portion of one municipality and annex it to another, the county council is not confined in its powers to the boundaries of the lands mentioned in the application, but may detach any lands it may deem proper from the one municipality and attach them to the other, subject, in case of the dissent of the municipality the area of which is reduced, to the award in the 2nd sub-section mentioned. It would, therefore, be no objection to a by-law of a county council detaching two parcels of land from one municipality and adding them to another, that the petition for the by-law described only one of the parcels and asked to have that parcel detached, for the council, being once set in motion, may, in the exercise of its discretion, detach all, or less, or more, than the territory described. The municipalities affected, however, have a right to require that there shall be a real exercise of discretion before the power is acted upon, it being judicial in its nature.

In the present case two petitions were presented to the county council: one for the detaching of the military reserve, a tract of 600 acres, concerning which, had it stood alone, no question could have arisen; the other being that of John Leadbetter and others, saying: "The portion we wish cut off is from a portion of land adjoining Norfolk street from Peel street on the south to Albert street on the north."

Some of the petitioners attended the committee of the county council and explained that the land intended by the petition was a block bounded on the west by Norfolk street, on the east by the Goderich and Saugeen gravel road, otherwise called Carlisle street, on the south by Peel street, and on the

north by Albert street, and the committee appear to have intended to recommend that the prayers of both petitions should be granted, and the county council adopted their report. The by-law, however, through some misconception on the part of the person who drew the description of the land to be detached, had the effect of detaching from the village of Southampton a very considerable piece of land, approximately about three-quarters of a mile long and 12 to 15 chains wide, lying west of Norfolk street and bounded by Anglesea street on the west, which no petitioner had asked the county council to detach, and which they never intended to detach. It is plain from the recital in the by-law and from the evidence of the persons concerned, that the insertion in the by-law of a description covering this piece of land was simply a mistake.

The by-law recites that the petitions included all the land detached; upon this by-law being laid before the council of Southampton they passed a by-law appointing an arbitrator to act for them under it. They afterwards discovered that there was no petition covering the portion of the land to which I have referred, and they protested, when the arbitrators met, against the validity of the by-law, and, although they did not withdraw from the arbitration proceedings, which seem to have lasted for the remainder of the day, after their protest had been overruled, they launched the present motion.

The by-law of the county council, in my opinion, was bad when passed because it altered the limits of the village of Southampton without intending to alter them to the extent actually affected, and without considering the expediency of so altering them; and the objection was not waived by the act of the Southampton council in passing a by-law appointing their arbitrator, because they were misled by the untrue recitals in the county council's by-law that the petitioners covered the whole of the lands detached. They should not be held to have waived an objection going to the root of the by-law, of which they were not aware: in the face of the recital, they were not obliged to verify it before acting as they did.

It is contended, however, that the matter being before the arbitrators, who have power to make any alterations they think proper in the boundaries fixed by the by-law, the error in the description contained in the by-law is immaterial, and may properly be left to the arbitrators to correct. That, however, would be taking an extremely loose view of the respec-

tive duties of the county council and the arbitrators. The county council acts as a judicial body in altering the boundaries; the arbitrators sit in some respects as an appellate tribunal in regard to the boundaries; and the municipality from which it is proposed to take away territory is entitled to the judgment of both bodies.

I think, therefore, that the by-law, for this reason, cannot stand, and that it must be set aside.

It may, perhaps, be well to point out that notice of the application should have been given to the Southampton council before the county council acted upon the petitions. It seems to be the intention of sec. 18 of the Municipal Act of 1903 that the by-law of the county council should provide for the reference of boundaries to the arbitrators only where the municipality from which territory is detached opposes it, and notice to that municipality is necessary for the purpose of ascertaining whether it opposes or agrees to the proposed alteration of its boundaries. That objection, however, was apparent on the face of the county by-law in the present case, and was, therefore, I think, waived by the appointment of an arbitrator.

It was objected that this was not a case in which one municipality could apply to quash the by-law of another, but I think it is manifestly within sec. 378a of the Municipal Act.

Appeal allowed with costs and by-law quashed with costs.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING NOVEMBER 19TH, 1904.)

VOL. IV. TORONTO, NOVEMBER 24, 1904.

No. 13

ANGLIN, J.

NOVEMBER 11TH, 1904.

CHAMBERS.

CITY OF TORONTO v. TORONTO R. W. CO.

(TWO ACTIONS.)

*Trial—Postponement—Determination of Questions Arising
in another Action Pending.*

Appeal by plaintiffs from order of Master in Chambers (ante 221) staying proceedings in two actions until the disposition of a certain other action pending between the same parties, and commonly known as the "omnibus action."

J. S. Fullerton, K.C., for plaintiffs.

J. Bicknell, K.C., for defendants.

ANGLIN, J.—The chief reason for making the order was that some of the issues raised in the omnibus action are identical with those invoked in these actions, and depend upon questions of construction of the principal agreement between these parties, which have been formulated in a special case. This special case has been heard and disposed of by me since the Master's order was made (see ante 330). As to the questions involved in that case an answer to which may affect issues in these actions, there need be no delay in proceeding with the trials of the latter. Plaintiffs' claim is for statutory damages for non-compliance by defendants with certain determinations of the city engineer, approved by the city council, in regard to "service" required upon certain lines of defendants' railway. The right to make such determinations and to require their observance by defendants has been affirmed in answer to the second question propounded in the special case above mentioned. It should not

be assumed that defendants will appeal from the judgment rendered upon the special case; and, if that were assumed, whatever might be the case as to other portions of that judgment, any contemplated appeal in regard to matters which affect the issues in the present cases, cannot serve any other purpose than delay. To continue the existing stay of proceedings because of such a prospective appeal would be tantamount to encouraging proceedings projected (if they be so) in the furtherance of a policy of temporization. An appeal from other parts of the judgment upon the special case would not affect these actions. Without saying that the order of the Master was erroneous under the circumstances existing when it was made, the stay of proceedings which it imposes should be removed.

Appeal allowed. Costs here and below to be in the cause.

NOVEMBER 14TH, 1904.

DIVISIONAL COURT.

MITCHELL v. WEESE.

Sale of Goods—Title—Trover—Bills of Sale Act—Estoppel—Ownership—Evidence.

Appeal by plaintiff from judgment of County Court of Victoria dismissing action in trover for the value of a black mare alleged to be the property of plaintiff.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

C. A. Moss, for plaintiff.

H. O'Leary, K.C., for defendant.

STREET, J.—Edward Murphy owned the mare in question down to January, 1897, at least: that is the common case of both parties. Owen Murphy swears that in that month his father (Edward) gave him the mare and a horse, in consideration of some work, and that he received possession of both, and had both in his possession until he sold the horse to defendant some two or three years before the trial; and that he had the mare in his possession thereafter until he sold her also to defendant in October, 1903.

Plaintiff claims title from Edward Murphy under a purchase from the latter on 29th April, 1899, of the mare in question and also of the horse above mentioned.

The evidence is not contradicted that a bargain was made between Edward Murphy and plaintiff at about that date, by which any claim that Edward Murphy had to the mare and horse was transferred to plaintiff, in consideration of \$15 cash and a note for \$35 made by plaintiff to Edward Murphy. Plaintiff alleged a further consideration as having formed part of the bargain, consisting in the release by him of a claim for pasturage of the horses: but this is denied by Edward Murphy, and is inconsistent with the consideration mentioned in the bill of sale of the mare and horse given by Edward Murphy to plaintiff on 29th April, 1899.

There being no doubt that Edward Murphy did sell to plaintiff any claim or title he had to the horses, no question seems to arise as to whether the bill of sale was good under the Bills of Sale and Chattel Mortgage Act. The sale was perfectly valid, apart from that Act, of any interest Edward Murphy possessed in the subject matter, and the Act is only aimed at protecting the rights of creditors and subsequent purchasers. If Owen Murphy had any title, he acquired it before, and not after, the bill of sale in question, and so the Act does not apply.

Nor can I discover upon the evidence any estoppel in pais against plaintiff. The conduct which the County Court Judge seems to have thought created an estoppel against him, was his permitting the mare and horse to remain in Owen Murphy's possession after he himself had become, as he alleges, the owner of them by purchase from Edward Murphy; and his allowing Owen Murphy to sell as his own property the colts raised from the mare, and his returning the horse to Owen Murphy after he had taken it away, on his being threatened with criminal proceedings.

All these circumstances are important, no doubt, as throwing light upon the relationship, but they do not amount in law to an estoppel against plaintiff in favour of defendant, because it does not appear that plaintiff ever held out to defendant, by word or conduct, intending him to act upon it, that Owen Murphy was the owner of the horses. Plaintiff was under no duty to defendant to take possession of the horse, but might leave it in Owen Murphy's possession, if he chose, without incurring any liability to defendant or any one else: *Hosegood v. Bull*, 36 L. T. N. S. 620; *Lelievre v. Gould*, [1893] 1 Q. B. 491.

I am not quite sure that the Judge intended to hold that the Statute of Limitations was a bar to the action, but it seems clear that it was not. If Owen Murphy obtained possession of the mare in 1897, as owner by transfer from his

father Edward Murphy, as he says he did, then the question does not arise; but, if he received it to pasture for his father, any demand of possession was clearly within six years, and the time does not run until demand.

In my opinion, however, the judgment is properly entered in favour of defendant upon the facts disclosed in the evidence. . . .

Owen Murphy had married plaintiff's sister shortly before he received possession of the horses from his father, and was, with his wife, living in a house he had built upon a piece of plaintiff's land, with the promise of a deed of it. I think it is established that he remained in actual possession of both horses from that time forward; his possession of the one in question continued until he sold her to defendant in October, 1893. The other one he sold a year or two before that time. During that period his father (Edward) seems to have come down to Owen's place once to try and get the horses, but he failed to get them, and never seems to have troubled himself more about them. Then he made the bill of sale to plaintiff of both horses. The inadequacy of the consideration—\$50—is explained by his statement that plaintiff was to fight Owen Murphy if he wanted to get the horses. As a fact plaintiff only paid \$15 cash, and he has refused to pay the note of \$35 given for the balance because he never got the horses. Plaintiff, therefore, living close to Owen Murphy, and claiming ownership of the horses, allows him to keep them and to treat them and their colts as his own property, and finally to sell them both. He seems to have taken away one of the horses and to have returned it under the pressure of criminal proceedings.

In my opinion the facts I have stated strongly support the statement of Owen Murphy that his father gave him the horses for his work, and that plaintiff knew of his title, but supposed for some reason that it could not be sustained. Plaintiff's conduct in allowing Owen Murphy to retain the horses after he had, as he says, purchased them from Edward Murphy, is totally unlike that of a man who had really purchased property and believed it to be his own. . . . I do not think there is any evidence sufficient to outweigh the strong presumption of title in Owen Murphy arising from the undoubted and admitted facts.

I think, therefore, that the appeal should be dismissed with costs.

FALCONBRIDGE, C.J., gave reasons in writing for the same conclusion.

BRITTON, J., concurred.

NOVEMBER 14TH, 1904.

C.A.

FARMERS' LOAN AND SAVINGS CO. v. PATCHETT.

Covenant — Assignment of Mortgage — Assignor's Covenant—Release of Part of Premises—Principal and Surety—Discharge.

Appeal by plaintiffs from judgment of MEREDITH, C.J., 2 O. W. R. 702, 6 O. L. R. 255, dismissing, as against defendant Coleman, an action on a covenant for payment contained in an assignment of mortgage by defendant Coleman to plaintiffs.

The appeal was heard by OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

W. M. Douglas, K.C., for appellants.

W. H. Irving, for defendant Coleman.

OSLER and GARROW, JJ.A., gave written reasons for judgment sustaining the appeal.

MACLENNAN, J.A., gave written reasons for dismissing the appeal, in which MACLAREN, J.A., concurred.

The Court being thus divided, the appeal was dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

McFADDEN v. BRANDON.

Limitation of Actions—Covenant in Mortgage—Acceleration of Time for Payment of Principal—Default of Payment of Interest—Commencement of Statutory Period—Potential Relief from Consequences of Default.

Appeal by plaintiff from judgment of STREET, J., 2 O. W. R. 623, 6 O. L. R. 247, dismissing the action, which was brought to recover the principal and interest due under a covenant in a mortgage made in 1879. STREET, J., held that the effect of the usual statutory provision contained in a mortgage, that in default of payment of the interest thereby secured, the principal should become payable, was to make

the principal at once due, so that the cause of action accrued upon such default under sec. 1 of ch. 72, R. S. O. 1897, the Limitations Act.

J. C. Judd, London, for appellant.

T. H. Purdom, K.C., for defendant.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, MACLAREN, JJ.A.), was delivered by

MACLENNAN, J.A.—. . . It seems too clear for argument that the cause of action arose on 15th March, 1880, and continued unimpaired during all the subsequent years, and there could be no answer to a statement of claim alleging that it arose on that day by virtue of default in paying interest. The contract is clear that on default of payment of interest the principal money and every part thereof should forthwith become due and payable as if the time for payment thereof had fully come and expired. There was default on 15th March, 1880, and then it was that the principal became payable, and it was then the cause of action arose. It is true that, by virtue of the proviso, defendant could, if the action had been brought before the expiration of five years, have had relief against that action on payment of arrears; but, even if he had done that, it could not be said that a cause of action for the principal money had not arisen.

For plaintiff it was suggested that the acceleration clause merely gave him an option to claim payment before the expiration of the five years, which had never been exercised. But that does not remove the difficulty, which is, that a cause of action arose at the end of the first year. It is always optional with a plaintiff to bring any action which may have arisen to him.

It was also said that the acceleration was in the nature of a penalty. But, if it were, I do not see how it would affect the question. But . . . Wallingford v. Mutual Society, 5 App. Cas. 685, shews that the proviso cannot be regarded as a penalty.

. . . Hemp v. Garland, 4 Q. B. 519, and Reeves v. Butcher. [1891] 2 Q. B. 509, . . . are distinct authorities in favour of defendant. . . .

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

DILLON v. MUTUAL RESERVE FUND LIFE ASSN.

Life Insurance—Misstatements of Insured as to Age and Disease—Evidence of Age—Admission of Parish Register—Prerequisites—Findings of Jury—Materiality of Misstatements—Insurance Act, sec. 144.

Appeal by defendants from judgment of MACMAHON, J., upon findings of a jury, in favour of plaintiff.

There had been a previous trial before BRITTON, J., and a jury, and upon the jury's answers to questions judgment had been entered for plaintiff. Upon appeal to this Court a new trial was directed (2 O. W. R. 78), which resulted as above.

The action was by the widow of John Dillon to recover \$2,000 upon a contract or policy of insurance upon his life.

The two defences principally relied upon were that the insured had misstated his age in his application for the policy, he having been born in 1847 and not in 1850 as stated, and that he had untruly stated that he had never had an abscess, whereas he had been a sufferer from abscesses all his lifetime.

The following questions, among others, were put to the jury at the second trial, and they made the following answers:—

1. Was the answer made by John Dillon that he was born on 24th August, 1850, untrue?

No, to the best of our knowledge.

2. Was the answer so given material except as to fixing the amount of premium?

No.

3. If you find Dillon misstated his age, was the answer given in good faith believing it to be true and without any intention to deceive the company?

We believe it was given in good faith.

4. Had Dillon, at the time of the application in 1891, or did he ever have, the disease of abscess or any open sore? State which.

He had a simple sore, but not at the time of his application.

5. If you find he had the disease of abscess or open sore prior to his application for insurance, state how long prior thereto.

About 20 years before the application, or when Dr. Maclean reduced the dislocation of the hip.

6. State whether the existence of the disease of abscess or open sore was something material to be stated by Dillon in answer to the question.

No.

7. Did Dillon suppress or withhold any information respecting his past or present physical condition which was material for the insurance company to know?

No.

G. T. Blackstock, K.C., and R. B. Henderson, for appellants.

I. B. Lucas, Owen Sound, and W. H. Wright, Owen Sound, for plaintiff.

The judgment of the Court (MOSS, C.J.O., MACLENNAN and MACLAREN, JJ.A.), was delivered by

MOSS, C.J.O.—. . . In view of their finding upon the first question, it was unnecessary for the jury to express any opinion upon the other questions, but there is ample evidence to support their conclusions with regard to them, and they may be regarded as not wholly immaterial.

As to the first question, the jury on the first trial found that the answer made by Dillon was not true, and on the appeal this Court expressed the opinion that the finding was in accordance with the evidence. But that opinion was formed having regard to all the evidence then before the Court, including a book or register of marriages and births produced upon the examination under commission of the Reverend Thomas O'Dwyer, described as administrator of Pallas Green, county Limerick, Ireland. At the first trial the register was received without objection, but at the second trial plaintiff, as she was entitled to, objected to its reception, and it was admitted subject to the objection.

The authorities shew that no proper case was made for its admission, and it should have been rejected. Nothing was shewn with regard to it except that the witness, who is described apparently by the commissioner as administrator of Pallas Green, county Limerick, says that he produces the registers of the parish in his custody. By what law or under what authority, if any, they were kept, is not disclosed. Reference is made to entries thereon, but the office or handwriting of the person by whom they were made is not shewn.

nor is it made to appear that they were made by him in the discharge of his duty, and that he is dead. The Imperial Act 7 & 8 Vict. ch. 81 (Ire.) does not apply to marriages of Roman Catholics. And in order to render the register admissible it was necessary to shew either that a public duty was imposed on the person making the entry, or that he made it in the course of his business, and to prove his handwriting and death. . . .

[Reference to *Lyell v. Kennedy*, 56 L. T. 647; *Malone v. L'Estrange*, 2 Ir. Eq. R. 16; *Dillon v. Tobin*, 12 Ir. L. T. R. 32; *Ryan v. King*, 25 L. R. Ir. 184; *Riggs-Miller v. Wheatley*, 28 L. R. Ir. 144.]

None of these prerequisites were shewn in this case, and the register ought not to have been before the jury.

Without it the jury could well conclude, as they have, that defendants, upon whom lay the onus of shewing an untrue statement, failed to prove it.

It may be that, even with the register before them, the jury were not wholly unreasonable in coming to the same conclusion.

But however that may be, defendants, having themselves introduced and pressed the admission of the register as evidence, cannot complain if the jury have come to a conclusion quite warranted by the evidence outside of it. Nor can they reasonably object to the principle of Rule 785 being applied in plaintiff's favour. As it turned out, no substantial wrong or miscarriage has been occasioned by the reception of the evidence. . . .

The answer of the jury to question 4, though not categorical, is in substance a distinct negative of defendants' allegation that the answer of the deceased with regard to abscesses and open sores was untrue. The question put to the deceased was: "Have you now or have you ever had any of the following complaints or diseases? Abscess? A. No. Open sores? A. No." If, as the jury find, he had only a simple sore before that time, and not even that at the time of the application, then these answers were quite true, for he had not at the time and never had the disease of abscess or open sores. By their answer to this question, as well as by their answers to the next two questions, the jury shew that they understood that the sore with which the deceased was afflicted prior to the time of the application was the sore spoken of by Dr. Maclean, and that it was not the disease of abscess or open sores, but was a simple sore which was not present at the time of the application. The jury do not find

that he had the disease of abscess or open sore prior to the application, but that there was a simple sore about 20 years before the application, when Dr. Maclean treated him for a dislocation of the hip. And so finding, it follows, as they also find, that its existence was something not material to be stated by deceased in answer to the questions. And the other allegations of the defence are covered by the last answer of the jury, that deceased did not suppress or withhold any information respecting his past or present physical condition which was material for the insurance company to know. The contract of insurance having been entered into in 1891, the provisions of sec. 5 of the Act 52 Vict. ch. 32 (O.) applied to it. By virtue of this section, no term, condition, . . . for avoiding the contract by reason of any statement in the application therefor or inducing the entering into of the contract by the company is valid unless limited to cases in which the statement is material to the contract, and the contract is not to be avoided by reason of the inaccuracy of any such statement unless it is material to the contract. This provision now forms part of sec. 144 of R. S. O. 1897 ch. 203. The effect is, to reduce all such statements virtually to the level of representations. And whether or not a representation was material was always a question for a jury, if there was one. And by sec. 33 (2) of 55 Vict. ch. 39 (O.), now sec. 144 (3) of R. S. O. ch. 203, it is expressly provided that the question of materiality in any contract of insurance shall be a question of fact for the jury or the Court if there be no jury.

It was contended that the findings of the jury were contrary to the evidence and the weight of evidence. But there was evidence upon which the jury might come to the conclusions that they did. As to the existence of the disease defendants were obliged to rest largely upon testimony . . . which carries the case no further than the existence of a sore on the leg. . . .

Defendants, in order to succeed in their defence, were obliged to convince the jury, first, of the existence of the disease of abscess or open sores, secondly, that the answers given in relation thereto were material to the contract, and lastly, that they were untrue. The findings of the jury are not in their favour on any of these points, and the defences therefore fail. . . .

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

RE WATEROUS AND CITY OF BRANTFORD.

Municipal Corporations—By-law—Closing Highway—Private Interests—Notice to Person Affected—Increased Expense of Maintenance.

Appeal by city corporation from order of MACMAHON, J., 2 O. W. R. 897, quashing by-law No. 770 of the corporation, providing for the closing up of a portion of a public street called Jex street, in the city, and diverting the original course of the highway.

W. T. Henderson, Brantford, for appellants.

W. S. Brewster, K.C., for Julius E. Waterous, the applicant.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.— . . . Notwithstanding the opposing affidavits, the applicant has succeeded in shewing that the proposed change in the street will seriously affect and depreciate his property. His access to and from his factory with teams and vehicles will be rendered more difficult. The direct route from his factory to the Toronto, Hamilton, and Buffalo Railway station, from which and to which he is constantly receiving and sending freight, will be cut off, and he will be obliged to go some considerable distance further if he wishes to get to the station by way of Market street. His fire protection will be rendered less effective, and in other respects the changed conditions will result to his disadvantage.

In view of these consequences to the applicant, it ought to appear clearly that the public interests imperatively called for the proposed change, or at all events that sufficient did appear to justify the council, acting in good faith, in coming to that conclusion.

If it appeared that in the public interest there was a pressing need for the change, if in the view of those acting on behalf of the city there had arisen a condition of affairs prejudicial to the general public, calling for intervention and remedy, and if, acting upon such considerations, and without reference to individuals or individual interests, it had been determined that the change must be made, the public interests should prevail, and the applicant must submit.

It is important to notice that until the receipt by the council of the letter of Mr. A. E. Watts, written on behalf of and in the interest of the Waterous Engine Works Co., there had been, as far as appears, no complaint from the public or any members of it concerning the condition of the street, or any demand for an alteration. So that it was only upon receipt of the letter that the attention of the council was directed to the street. They were then required to consider a distinct proposal to close up the portion of the street intervening between two parcels of land belonging to the Waterous Engine Works Co., and perhaps as involved therein the effect upon the street and its user by persons owning property thereon and others, in the event of the Waterous Engine Works Co. erecting buildings at the other side of the street. . . .

It is significant that no members of the council, or others who might be considered as regarding the matter from the point of view of the public interest, visited or examined the applicant's premises or made any attempt to ascertain how he or his property would be affected or what his views were with reference to the proposed change. On the contrary, the committee to whom Mr. Watts's letter was referred seem to have been satisfied to leave that task to the Waterous Co. They recommended that the company be requested to meet any "parties" affected by the proposed change, and, if possible, to make satisfactory arrangements with them, and the council adopted the report. Whether the company were requested to meet the "parties" does not appear, but, whether or not, nothing was done. The applicant was one of the public specially interested in the street, yet his interests were apparently not taken into consideration. The council left the publication of the notices and the conduct of the matter in the hands of the representative of the company. A draft agreement for the sale of the portion of the street to the company was prepared, and everything was done on the footing of a foregone conclusion that the proposal would be carried through.

It is further to be noticed that, although Mr. Watts's letter speaks of buildings to be erected and workmen to be employed as the result of the proposal being accepted, the agreement with the company is silent with regard to these matters. The company are in no way bound to build or employ further workmen. They are left free to make such use of the land to be conveyed to them as they think fit. On the other hand, the city is burdened with the maintenance for the future of a longer street or highway. The company are only

bound to pay a sum sufficient to reimburse the city all expenditure incurred in diverting the street, and in establishing it as diverted in the same condition as the portion to be closed, but there is no provision for the maintenance and care of the additional strip of roadway rendered necessary by the diversion. . . .

So far as the interests of the public are concerned, they do not appear to have been furthered. No person seems to be benefited except the Waterous Co., with whom the scheme originated.

Appeal dismissed with costs.

NOVEMBER 14TH, 1902.

C.A.

TORONTO GENERAL TRUSTS CORPORATION v.
CENTRAL ONTARIO R. W. CO.

Railway—Mortgage on Undertaking—Bonds—Interest Coupons—Arrears—Real Property Limitation Act—Covenant—Acknowledgment.

Appeal by defendants Blackstock and Weddell from judgment of BOYD, C., 2 O. W. R. 946, 6 O. L. R. 534, dismissing appeal from report of local Master at Belleville, who allowed defendant Ritchie, the respondent, to prove in his office a claim for interest upon certain railway bonds for a period exceeding 6 years before action.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.

T. P. Galt, for appellants.

A. B. Aylesworth, K.C., and J. H. Moss, for defendant Ritchie.

GARROW, J.A.—The bonds in question were issued by defendant railway company pursuant to statutory powers in that behalf, and were secured by a first mortgage dated 1st April, 1882, upon the railway, its lands, rolling stock, tolls, revenues, and present and future property and effects, franchises, and appurtenances of every description; the principal payable on 1st April, 1902, and interest in the meantime at 6 per cent. half-yearly on the 1st days of October and April in each year on the surrender of coupons annexed, as they severally became due, for such interest.

The mortgage was in form a conveyance in trust by the railway company to the Toronto General Trusts Company (as it was then called), and the trustees were authorized and required, in case of default for 3 months in the payment of any interest, upon the request of 75 per cent. of the holders of such bonds, to take possession and operate the railway while such default continued. And upon default in payment of the principal of such bonds, upon a like request by 75 per cent. of the bond-holders, the trustees were directed to take proceedings to enforce payment of all bonds issued under the provisions of the said mortgage and the interest unpaid thereon, as speedily as possible. And the said mortgage contained a covenant by the railway company to pay the principal and interest of the said bonds, when and as the same became due, according to the tenor and effect thereof. The bonds were, on their face, made payable to "The Toronto General Trusts Company or the bearer hereof," and the coupons for interest were, on their face, payable simply to bearer.

Default having taken place in the payment of the principal and also of interest, the trustees commenced foreclosure proceedings, under which, by a judgment of the High Court dated 23rd March, 1903, it was referred to the said Master, among other matters, to inquire and report who are the holders of the bonds of the said railway and of any interest coupons issued with the said bonds, and what is due to each in respect thereof.

And upon this reference the Master found and certified, in what may be called an interim report, that the defendant Ritchie had appeared before him and claimed to be the holder of a large number of bonds with coupons attached, and also a large number of detached coupons, all of which detached coupons had matured more than 6 years prior to the institution of the action, and that, objection having been taken by counsel for the present appellants to the right of the said Ritchie to prove upon the said detached coupons, and also upon all attached coupons which matured more than 6 years prior to the date of the action, and further to the right to charge the lands and undertaking of the defendant railway company with more than 6 years' arrears of interest, he had proceeded to consider the said matter and found that none of the coupons, whether attached or detached, were barred by the Statute of Limitations, and that they are all entitled to the same rank as the principal payable by the bonds. . . .

I agree generally with the views expressed by the Chancellor, which are quite sufficient for the disposal of the case,

and will only add that it appears to me that two other and equally cogent reasons might, if necessary, be given in support of the learned Chancellor's judgment.

The first, that in foreclosure actions it is a matter of course, even in cases where the provisions of the Real Property Limitations Act apply, to allow upon the covenant, where there is one, more than 6 years' interest, if there are no subsequent incumbrances: *Macdonald v. McDonald*, 11 O. R. 187. And the different bond-holders in the present case, all claiming under the same mortgage security, do not, in my opinion, stand in the relation of prior and subsequent incumbrancers towards each other.

And second, the written acknowledgment of indebtedness in respect of the interest in question dated 4th July, 1903, appears to be amply sufficient to meet the objection of the statute, even if it is applicable.

This acknowledgment was apparently duly authorized at a meeting of the directors. Its terms are wide enough to embrace all the outstanding coupons, and not merely those held by Mr. Ritchie, and it is therefore not properly open, I think, to the reproach contended for in argument that it is in effect an acknowledgment given by Mr. Ritchie to himself. Mr. Ritchie, it is true, was at the directors' meeting, but he is the president of the company, and it was his duty to be there. But he was only one of eight directors present. Nor, so far as appears, is he the only holder of overdue and unpaid coupons who would gain by the acknowledgment.

The only answer made or attempted to be made to the sufficiency of this acknowledgment upon the argument before us was, that it was obtained by Mr. Ritchie for his own benefit and purpose, and reliance was placed upon the cases of *Astbury v. Astbury*, [1898] 2 Ch. 116; *Bolding v. Lane*, 1 DeG. J. & S. 122; and *Lowndes v. Garnett*, 33 L. J. Ch. 418. But an examination of these cases clearly shews that they have really no application. In *Astbury v. Astbury* it was held that one of two trustees could not bind the lands by an acknowledgment given against the wish of the co-trustee, nor indeed without his active concurrence; in *Bolding v. Lane* it was held that a mortgagor could not by an acknowledgment affect a subsequent incumbrancer; and in *Lowndes v. Garnett* it was held that the acknowledgment relied on did not amount to an admission that the debt in question was due.

For these, as well as the reasons given by the learned Chancellor, I think the appeal fails and should be dismissed with costs.

MACLENNAN, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., also concurred.

NOVEMBER 14TH, 1904.

C.A.

CONNELL v. CONNELL

Will—Execution—Testator's Signature—Conflict of Evidence as to whether Witnesses Present—Lapse of Sixteen Years—Will Drawn by Person Taking Benefit—Onus of Proof.

Plaintiffs seek probate of the will of one James Connell, who died 30th May, 1903.

The alleged will was made 9th January, 1887. Plaintiffs were two of the brothers of deceased, and the executors named in the will; and defendants were four other brothers and the widow of the testator, and others interested in his estate in case the will should be held invalid.

The action was tried before BRITTON, J., who gave judgment (3 O. W. R. 35) declaring the will to be invalid on two grounds, namely, for want of due execution according to law, and also for want of sufficient proof that the instrument propounded was the last will of deceased. Plaintiffs appealed.

J. L. Whiting, K.C., and W. E. Middleton, for appellants.

J. A. Hutcheson, K.C., for defendant Jane E. Connell, the widow.

G. H. Watson, K.C., and C. F. Maxwell, St. Thomas, for the other defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

MACLENNAN, J.A.—The undisputed facts are the following: The deceased at the time of the making of the alleged will was a farmer, of mature age, having a wife still living, but without children. His father was still living, and he had six brothers, including the two plaintiffs, and two or three sisters. He was a prosperous man, having accumulated a large estate, amounting at the date of the will to about \$50,000, and at the time of his death estimated at from \$70,000 to \$80,000. A few days before the making of the will he became ill with an attack of what is said to have been

pneumonia, of a serious character. The will was drawn up on Saturday night between ten o'clock and two the next morning, and was signed by the deceased with a strong vigorous looking signature, nowise different from other signatures made by him when in health. The will was drawn, in a fair, legible hand, by his brother, the plaintiff William, who, although not a professional man, had been in the habit of drawing wills. The attestation clause is in the regular form, and has appended to it the undisputed signatures of one James McFadden, who was then a hired servant of the deceased, then living in his house, and of one Annie Connell, a niece of the deceased. There is an interlineation in the will, to which these persons also admittedly appended their initials in the margin. The will therefore on its face has all the requisites of a valid will. It is also undisputed that the will was signed by the deceased, and also by the two witnesses in the bedroom in which he was lying. From that time until the death of the deceased the will remained in the possession of the plaintiff William. The deceased recovered from his illness in a short time, and lived more than sixteen years afterwards, carrying on his business, and in the interval largely increased the volume of his estate. The widow testifies that some time during the following year after the will was made, she spoke to her husband, saying that she had heard he had made his will and had not left her much, and that he went on to tell her what he had left her and others.

What we have here then is a will which, upon its face, appears to be made with all the formalities required by law, and believed by the deceased to be his will, and attacked after more than sixteen years for want of due conformity to the requirements of the law as to its execution, enjoined by sec. 12 of the Wills Act.

What that section requires is that "the signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator."

Now what the defendants say on the question of the due execution of the will is, that the signature of the testator was not made or acknowledged by him in the presence of the two witnesses; and that is the sole point, for it is not disputed that they attested and subscribed it in the presence of the testator, and it was not essential that they should have subscribed in presence of each other: Theobald, p. 30, and cases there cited.

The evidence in favour of due execution is that of William, who drew the will, and that of his brother Martin; and the evidence against it is that of the two subscribing witnesses.

William's evidence is that the will was completed, ready for signature, and read over to the deceased carefully during the night, about two o'clock in the morning, and that the execution of it was deferred until after breakfast, and that in the morning he went out and brought McFadden and Annie Connell into the bedroom, telling them what they were wanted for. He then told the deceased to ask them to be his witnesses, which he did by saying, "You will be witnesses, or you will act, or will you act?" He says he then told them it was necessary for them to sign in each other's presence, and read over the attestation clause to them. He then said to the deceased, "Are you ready, James?" Whereupon he rose into a sitting posture on the side of the bed and wrote his name upon the will, which was placed upon a stand in front of him, after which McFadden and Annie Connell signed their respective names in succession and placed their initials in the margin opposite to the interlineation. The will was then folded, and the testator asked William to take care of it, which he did.

That is William's evidence, and I do not find that it is shaken in cross-examination.

Martin's evidence is, that he was present when the will was executed, that when the two witnesses went to the bedroom, he followed them to the bedroom door, and he relates the proceedings as to the request by the deceased to the witnesses, the reading of the attestation clause, the signing by the deceased and by the witnesses, the intialling, and all the other details, in the same manner as had been related by William. This witness was also subjected to a very lengthy cross-examination on behalf of defendants, but without affecting his testimony.

This is all denied by both McFadden and Annie Connell. They both say they did not see the testator sign, that they were simply asked to sign their names, and did so. It was only after much hesitation that either of them, particularly Annie Connell, admitted that he or she thought or knew that it was a will they were asked to witness. Annie Connell says that she came into the bedroom after McFadden, that she did not see the deceased sign, that when she came in McFadden stepped aside, and she signed and put her initials in the margin. She denies having observed either the deceased's signature or that of McFadden on the paper when

she signed, and admits that on a former examination she denied having appended her initials. McFadden says that the attestation clause was probably read over in his presence before he signed, but he did not see the deceased sign. The trial was on 3rd December, 1903, and he was shewn a letter of the previous 29th June, written by him to William Connell. In this he says he cannot see his way to make an affidavit proving the will as a subscribing witness. He says he remembers quite well signing the will, but has no recollection of seeing the deceased do so. He says he had two letters from the solicitors of two of the sets of defendants making inquiries. At the trial he says positively that the deceased did not sign in his presence, that, although that happened 16 or 17 years ago, since then he has had a good deal of thought on the matter, and his mind has been greatly revived on it. He then said he did not know the deceased's signature, never saw him sign his name, never witnessed any other document for him, no never. He is then confronted by a deed made by the deceased on 16th January, 1888, witnessed by him, with an affidavit indorsed thereon sworn by him, which he was obliged to admit, but which he had forgotten.

Upon this evidence, absolutely contradictory as between William and Martin Connell on the one side, and McFadden and Annie Connell on the other, the learned Judge says he believes the latter. He thinks the occasion was so impressive that they would be likely to remember whatever was said or done by the sick person. He thinks it not impossible that William would get the signature of his brother before the witnesses were called in, and would be satisfied with the mere signatures of the witnesses without a complete compliance with the statute, that it is conceivable that, not being a lawyer, he thought a statement of compliance with the law as good as if actually done. . . . [Further reference to parts of the evidence.]

Now, I do not think there is any substantial conflict in all these statements, no greater discrepancy than might be expected after the lapse of sixteen years. Both McFadden and Annie Connell say Martin was present when they signed—McFadden says towards the door; Annie Connell says he was present at her left. William says when the witnesses came in Martin stepped out, stepped into the other room, and Martin himself, while relating with detail all that took place, says that when the witnesses came in he followed them to the door. I think all this evidence means that while the signing was going on Martin was standing in the dining-room just outside

of the bedroom door, where he could and did hear and see all that was said and done in the bedroom.

I therefore think, with great respect, that the learned Judge was wrong in excluding from consideration the important evidence of Martin, on the ground that he was not present, and could not have seen or heard what he relates.

The case is, therefore, not a question between William alone on the one side, and the two witnesses on the other, as treated by the learned Judge, but between William and Martin on the one side, and the two witnesses on the other.

While very great weight is to be given to the opinion of the learned Judge, who saw and heard the witnesses, and also to the fact that McFadden was disinterested, while all the others were more or less interested in the result of the action, yet I think that, assuming that they are all honestly telling what they believed to be the truth, and particularly having regard to what I think was an error by the learned Judge in excluding all consideration of Martin's evidence, we are in the same position as the learned Judge in considering the case, and bound to form an independent judgment upon the question, which is, what upon the evidence is the most probable conclusion of fact?

With great respect I think that conclusion is in favour of the due execution of the will.

The will is in all respects in proper legal form. The signature of the testator is undoubted. It is a strong vigorous signature, nowise different from other signatures of his made in health, and which could hardly have been made by a person in a reclining position. The witnesses admit they signed it on a small table standing by the bed. The attestation clause signed by the two witnesses declares that it was signed by the testator in the presence of both of them who in his presence and at his request subscribed their names in presence of each other. Now I think all this affords an overpowering presumption in favour of the due execution, and when we add to this that one of the witnesses thinks that, before he signed it, the attestation clause was read over to him, the case is presented of two persons asserting that the statements in a paper which they signed sixteen years before were not true. No doubt, as the learned Judge says, the occasion was an impressive one; but beyond that it was not a matter in which either of the parties was otherwise interested, and it is common experience how much, after so many years, the details of an occurrence in which one is not interested, fade from the memory. I think it most improbable that William, who was in the habit of drawing wills, and who

had drawn the attestation clause from memory, without, as appears, having any form from which to copy it, should have had the testator sign before the witnesses came in. There is no pretence that the signature of the deceased was covered over or concealed, and yet the witnesses have no memory of having seen it. They must have seen it, and have forgotten the fact, and I think the proper conclusion is that they saw the testator sign, just as they have certified over their respective signatures, and as related by William and Martin, and that they have forgotten that fact, just as they must have forgotten that they saw his signature.

Many cases were cited to us, but none which, in my opinion, obliges us to hold on the evidence of the two subscribing witnesses, and contrary to the evidence of William and Martin, that this will was not executed just as expressed on its face, and as expressed in the certificate signed by the two witnesses.

The other question is, whether the will having been drawn by William, who takes a substantial benefit under it, he has satisfied the onus cast upon him by that circumstance, as laid down in *Fulton v. Andrew*, L. R. 7 H. L. 471, *Tyrrell v. Painton*. [1894] P. 151, and *Adams v. McBeath*, 27 S. C. R. 13, of shewing the righteousness of the transaction. I think that onus is satisfied by the fact that the testator soon recovered his usual health, and lived for sixteen years afterwards, and allowed his will to stand without taking any step to alter or revoke it.

For these reasons I am of opinion that the judgment should be reversed, and that probate should be ordered to go.

NOVEMBER 14TH, 1904.

C.A.

MYERS v. RUPORT.

Limitation of Actions—Real Property Limitation Act—Acquiring Title by Possession to Undivided Half of Lot—Husband and Wife—Joint Occupancy—Rights of Husband Surviving Wife—Declaration of Title—Rights of True Owner.

Appeal by defendants from judgment of BRITTON, J., 2 O. W. R. 674, in favour of plaintiff.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.

A. B. Aylesworth, K.C., for appellants.

D. B. Maclelennan, K.C., for plaintiff.

MOSS, C.J.O.—Plaintiff seeks a declaration that he is seised in fee simple of an undivided half of the north half of the south-west quarter of lot 31 in the 9th concession of Cornwall, of which he is now in the sole possession.

He admits that defendant Beaque Ruport is entitled to the other undivided half, subject to incumbrances in favour of the defendant Newman; and he asks that partition be made between him and defendants.

Defendants deny plaintiff's title and assert that the title to the whole parcel is vested in defendant Beaque Ruport subject to the incumbrances.

Plaintiff founds his claim of title upon possession of the parcel for more than the statutory period.

A short statement of the paper title will suffice for the purposes of the question to be determined.

On and after 1st March, 1872, defendant Beaque Ruport and one Adam Ruport were the owners as tenants in common of the south-west quarter of the lot, containing 50 acres, and Adam Ruport alone was in possession.

He died on 30th March, 1872, having by his will devised his undivided half to his wife Caroline Ruport for life. He made no disposition of the remainder, and died without issue; consequently the remainder descended to his father, Levi Ruport. After Adam's death his widow continued in possession of the whole parcel. On 4th March, 1873, she intermarried with plaintiff, and they continued in sole possession until 24th December, 1887, when they conveyed the south half of the south-west quarter to defendant Beaque Ruport, who entered into possession thereof.

Plaintiff and his wife continued in possession of the whole of the north-west quarter during their joint lives. On 3rd March, 1903, plaintiff's wife died without issue, and plaintiff has remained in possession of the whole.

Levi Ruport died in the year 1885, leaving a will whereby he devised his undivided estate in remainder to defendant Beaque Ruport.

Upon the death of plaintiff's wife, defendant Beaque Ruport became entitled, as devisee of his father, to the undivided one-half of which she was tenant for life, and he claims that he is still the owner of the other undivided half,

notwithstanding the possession commencing with that of plaintiff's wife from 30th March, 1872, and continuing until her death on 3rd March, 1903. But the sole question in this action is, whether plaintiff is entitled to a declaration of title in his favour. Plaintiff's marriage was after the coming into force of the Married Women's Property Act, 1872. His wife was in sole possession, and, as against defendant Beaque Rupert's undivided half, the Statute of Limitations had begun to run in her favour. At all events the possession was in her, and it was such as was capable of ripening into a title under the statute as against Beaque Rupert. It was an interest in real estate which was capable of transmission by will or by transfer *inter vivos*. As against everybody but Beaque Rupert she was the owner in fee.

This interest in real estate was secured to her on her marriage by virtue of the 1st section of the Married Women's Property Act, 1872. She owned it at the time of her marriage, and it was hers to be held and enjoyed for her separate use free from any estate or claim of plaintiff.

The marriage did not disturb her right or interest in the estate. Neither could her husband's possession, for she was in possession at the same time.

The possession which she had begun against Beaque was continued by her notwithstanding her coverture. She made no assignment or transfer of her rights or interests or any part of them to plaintiff. To hold that he acquired such rights or interests by the mere fact of coverture and by possession taken only in consequence of the marriage, would be to deprive her of the benefit and protection of the Married Women's Property Act. Plaintiff could not become seised or entitled jointly with his wife, and thus acquire some of her rights, simply because they lived together on the land, any more than he could thus acquire her estate in other lands owned by her at the time of the marriage. But for the fact that there was a lawful marriage, the nature of plaintiff's possession resembles that of the person who had gone through the ceremony with the wife of plaintiff in *McArthur v. Egleson*, 43 U. C. R. 406, 3 A. R. 577.

As against defendant Beaque Rupert, therefore, the possession was that of plaintiff's wife, and, if that possession ripened into a title, it was gained by the wife and during her lifetime.

Upon the facts and the record as framed there should not be a declaration in plaintiff's favour, and his action should be dismissed. The rights of his wife's heirs are not

in question in this action. Neither is his right to possession as against others.

It may appear anomalous at first sight, but, although plaintiff is not entitled to a declaration of title from the Court, it does not follow that he is subject to be dispossessed by defendant Beaque Ruport or those claiming under him. In that respect plaintiff's present possession, coupled with the non-possession of defendant Beaque Ruport, may prove to be difficulties in the latter's way. . . .

[Reference to Kipp v. Incorporated Synod of Diocese of Toronto, 33 U. C. R. 220; Willis v. Earl Howe, [1893] 2 Ch. at p. 553, 554; Agency Co. v. Short, 12 App. Cas. 793.]

In the present case we are not called upon to determine more than that plaintiff has not shewn himself entitled to the relief he seeks in this action.

The appeal should be allowed and the action dismissed with costs.

OSLER and GARROW, JJ.A., concurred, the former giving reasons in writing.

MACLENNAN and MACLAREN, JJ.A., dissented, the former giving reasons in writing.

NOVEMBER 14TH, 1904.

C.A.

RE DONALDSON, GIBSON v. DONALDSON.

Executors and Administrators — Charging Administratrix with Loss to Estate—Contract for Sale of Land—Reasonable Price—Statute of Frauds—Chattels..

Appeal by plaintiff from order of a Divisional Court (3 O. W. R. 290) allowing appeal from order of FALCONBRIDGE, C.J. (2 O. W. R. 810). dismissing defendant's appeal from report of local Master at St. Catharines, in an administration proceeding, charging the defendant as administratrix with \$1,025 as loss to the estate by reason of a sale of 80 acres of land belonging to the estate to Arthur Traver, her nephew and an infant.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

I. F. Hellmuth, K.C., and J. H. Ingersoll, St. Catharines, for appellants.

W. H. Blake, K.C., for defendant.

MACLAREN, J.A. (after stating the facts at length):—From the very careful summary of the evidence as to the value of the land made by the Chancellor in his judgment in the Divisional Court, it appears that the price paid by Traver was a fair one. It was at least \$700 more than the highest bid at the auction, and only \$100 below the reserve bid.

The evidence is conflicting as to the extent of the knowledge of the administratrix of the negotiations of Traver with these purchasers and others. The Master found and the plaintiff has contended before us that, as she was aware of some at least of these negotiations, it was her duty to have inquired further into them, and as she had not then given a deed to Traver, that she should have made the sales to these persons herself, and thereby have secured the benefit of the increased price for the estate.

A sufficient answer to this claim is, as to Singer, it was not in her power to have made it. If she had repudiated her sale to Traver, there is no evidence that his mother would have given her the required strip to Lake Ontario to make the rifle range, and without this Singer would not have bought. Indeed it may reasonably be assumed that she would not have given it at all in the event of such repudiation.

The sale to Coleman is one that it would not have been proper for an administratrix to have made. From his record it is very doubtful if Traver will be able to realize his money from him. Further, there is no satisfactory evidence as to the value of the remaining 25 acres still in Traver's hands. It is shewn that the land is impoverished and without a roadway.

In the circumstances I do not think we are called upon to decide whether the administratrix had a right to cancel her agreement with Traver, and refuse to give him a deed. There is no satisfactory evidence that she could have sold to better advantage. In my opinion the Master erred in looking at the matter in the light of the subsequent sales by Traver and assuming that she could have made them. There is no evidence to sustain such an assumption. On the contrary, if he had refused his offer, she might have been held liable.

On the whole, I am of opinion that the judgment of the Divisional Court should be affirmed.

MOSS, C.J.O., MACLENNAN and GARROW, J.J.A., concurred.

OSLER, J.A., with some hesitation, also concurred.

NOVEMBER 14TH, 1904.

C.A.

CITY OF OTTAWA v. OTTAWA ELECTRIC CO.

Arbitration and Award—Municipal Corporation—Agreement with Electric Company—Erection of Poles and Wires in Streets—Use of by another Company—Authorization—Resolution of Council—By-law—Compensation—Action—Reference to Arbitrators—Motion to Set aside Award—Weight of Evidence—Interference with Operation of System—Misconduct of Arbitrators—Champerty—Decision on Questions of Law.

Appeal by defendants from order of FERGUSON, J. (3 O. W. R. 65), dismissing motion by defendants to set aside an award in respect of the use of the poles erected by defendants for transmitting electricity in the city of Ottawa.

G. F. Henderson, Ottawa, for appellants.

E. D. Armour, K.C., and Glyn Osler, Ottawa, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

GARROW, J.A.— . . . The submission was made by counsel at the trial, in an action brought by plaintiffs against defendants to enforce an agreement between defendants and plaintiffs the corporation of the city of Ottawa, whereby, on the granting to defendants of a right to place poles upon public highways in the city of Ottawa, to be used for the purpose of supplying electricity by the defendants, the corporation of the city had reserved the right to permit and allow any other company authorized by the city to use defendants' poles so placed, for electrical purposes, on paying such compensation as might be agreed upon, or, failing agreement, by arbitration.

The submission as contained in the judgment, so far as material, is in the following words:

"2. This Court doth order that this action be and the same is hereby referred to the award of a board of arbitrators, consisting of one person to be appointed by plaintiffs the Consumers' Electric Co., Limited, one person to be appointed by defendants, and a third person, being an expert electrical engineer, to be appointed by the Court under and pursuant to the provisions of the Arbitration Act, R. S. O. ch. 62.

"3. And this Court doth further order that the said board of arbitrators do survey or view the streets and the poles of defendant company in the statement of claim mentioned, and ascertain, note, and award whether plaintiffs the Consumers' Electric Company, Limited, can use said poles on the said streets or any or some of them for electrical purposes without interfering with the efficiency, operation, and completion of the system of defendant company according to the terms of the agreement between plaintiffs the corporation of the city of Ottawa and the Ottawa Electric Light Co., and others, dated 30th June, 1894, in the pleadings mentioned, and to what extent, and in what manner the same can be done.

"4. And this Court doth further order that in addition to the matters in question in this action the said board of arbitrators do ascertain, state, and award what compensation shall be paid by plaintiffs the Consumers' Electric Company, Limited, to defendants for or in respect of the use of the said poles or any of them in the manner and for the purpose ascertained and stated in accordance with the preceding paragraph hereof, if any such use is allowed.

"6. And this Court doth further order that the council of the city of Ottawa may supplement the license granted by them to plaintiffs the Consumers' Electric Company, Limited, by the passing of the resolution of 21st April, 1903, in the pleadings mentioned, by a by-law in the same terms.

"9. And this Court doth further order that the award of a majority of the said arbitrators shall be the award of the said board, and shall be binding upon the parties hereto in every respect in the same manner as if it were the unanimous award of the said board of arbitrators."

Acting under this reference plaintiffs appointed R. F. Kelch, defendants H. D. Bayne, and the Court James B. Cahoon, as the arbitrators, and a majority of them, namely, James B. Cahoon and R. F. Kelch, made their award dated 7th August, 1903, whereby they awarded that the Consumers' Electric Company may go on the poles of the Ottawa Electric Company "as specified in No. 13 herein," (a list in detail of the streets and poles), and "we rule that they are entitled to take in accordance with their petition dated 10th March, 1902, exhibit No. 15 herein, and in accordance with by-law No. 1472 of the corporation of the city of Ottawa, and resolution of the city council dated 21st April, 1902, and that such use will not interfere with the efficiency, operation, and completion of the system of the Ottawa Electric Company."

Defendants contended on the original motion before the late Mr. Justice Ferguson, and again before us, that what is called an award was in fact merely a report, and that therefore they were entitled, as in the case of a report, to appeal against the findings upon the evidence. We, however, at the hearing overruled this contention, holding that what was before us was strictly an award and not a report, and that the argument should be accordingly limited as in the case of a motion to set aside an award, and upon this footing the argument proceeded.

Mr. Henderson for the defendants then argued:

1. That the resolution of the city council of 21st April, 1902, was insufficient—that a by-law should have been passed before the award;

2. That the arbitrators had exceeded their authority in allowing plaintiffs the Consumers' Electric Company to interfere with defendants' wires by confining them as proposed;

3. And that the award was void for uncertainty in that it failed to prescribe the length of the cross-arms, the kind of wires, and the voltage, which might be used by the Consumers' Electric Company.

He also contended that the agreement between plaintiffs to carry on this litigation was champertous, and that the arbitrators or some of them had been guilty of misconduct, but he evidently did not place much faith in these latter objections, for which, in my opinion, there was no foundation.

In my opinion defendants also fail upon the other or main objections.

As to the first, I am not at all satisfied that the resolution was not in itself sufficient, but in any event the objection does not appear to be open to defendants after agreeing to clause 6 of the submission or judgment. Under that clause the city council clearly might (as they afterwards did) pass a by-law either before or after the making of the award.

As to objection 2. The powers which the arbitrators assumed to exercise in directing the interference complained of with defendants' wires, seem to fall directly within the terms of clause 3 of the submission. By that clause the arbitrators were directed to ascertain, state, and award whether plaintiffs the Consumers' Electric Company could use defendants' poles without interfering with the efficiency, operation, etc., of defendants' system, and to what extent, and in what manner the same could be done. This language seems to be sufficiently comprehensive to justify the method or interference complained of. That method represents the

opinion and judgment of the arbitrators as, to how and to what extent plaintiffs the Consumers' Electric Company might and could use defendants' poles "without interfering with the efficiency, operation, &c., of defendants' system" within the terms of clause 3 of the submission.

As to objection 3. I am wholly unable to see any proper foundation for this objection. Plaintiffs the Consumers' Electric Co. evidently contemplate carrying on a business somewhat similar to that of defendants, a rival company in fact. Their cross-arms, wires, etc., will therefore probably be somewhat similar in length, size, voltage, etc., to those of defendants. But there is nothing in the submission to shew that the arbitrators were required to specify anything as to length, size, or voltage, so that, instead of holding that the award is void for uncertainty in not dealing with these matters, I am inclined to think that it would have been a valid objection if it had, as in excess of jurisdiction. However that may be, it is, I think, clear that this objection also wholly fails.

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

FENSOM v. CANADIAN PACIFIC R. W. CO.

*Railway—Injury to Animals on Track—Neglect to Fence—
Escape of Animals from Private Way to Track—Escape
from Highway—By-law of Municipality Allowing Cattle
to Run at Large—Crown Lands.*

Appeal by defendants from judgment of a Divisional Court (3 O. W. R. 227, 7 O. L. R. 254), dismissing defendants' appeal from judgment of BRITTON, J. (2 O. W. R. 479), and allowing plaintiff's cross-appeal, in action to recover the value of cattle killed upon defendants' track in the township of Nairn, Algoma.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW. MACLAREN, J.J.A.

I. F. Hellmuth, K.C., for appellants.

J. H. Clary, Sudbury, for plaintiff.

OSLER, J.A.—Plaintiff's cattle, the loss of which is in question in this appeal, not being in charge of any one, were at large upon a highway, within half a mile of the intersection of such highway with defendants' railway at rail

NOVEMBER 14TH, 1904.

C.A.

OSTERHOUT v. OSTERHOUT.

*Will—Construction—Bequest of Personalty—"Reversion"—
Gift over—Absolute Interest.*

Appeal by defendant from judgment of a Divisional Court (3 O. W. R. 249, 7 O. L. R. 402), reversing judgment of MACMAHON, J. (2 O. W. R. 842), in an action for the construction of the will of Wilfred E. Osterhout. The testator gave to his father (the defendant) one-half of his ready money and of all his estate, "with reversion" to his brother (the plaintiff) on the decease of his father, and the other half to his brother. The portion of the estate in question consisted of \$7,000 deposited in a bank. The Court below held that the father was entitled for his life only to the use of one-half of the money, and that, subject to the life interest of the father, the brother took the same absolutely.

W. E. Middleton and C. H. Widdifield, Picton, for appellant.

G. Kerr and Joseph Montgomery, for plaintiff. .

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

MACLENNAN, J.A.— . . . It has often been remarked that the construction put upon different words in other wills affords but little help in such cases, and in *In re Blantern*, [1891] W. N. 54, the Court of Appeal said: "The proper rule for construing a will is to form an opinion apart from the cases, and then to see whether the cases require modification of that opinion; not to begin by considering how far the will resembled others on which decisions had been given."

Now here the testator gives the half to his father, and if he had stopped there no question could arise. But that is not all his meaning or intention. He means his brother to have something at the decease of his father. What is it? It is the "reversion," and evidently the reversion of what he had given to his father. I think the plain meaning of the words used, "with reversion to my brother," is, that what he has given to his father should "revert" to his brother on the event named, that is, should go over to his brother.

This construction gives effect to the words used by the testator, whereas the construction contended for by the appellant would give them no effect at all, but would hold them to be meaningless and useless.

If we now look at the decided cases, there are none, as I think, which require us to put a different construction upon the words, or to hold that the testator's intention to give something to his brother in the half which he gave to his father at the latter's death, should be defeated. . . .

[Reference to *Sheldon v. Kimble*, 53 L. T. N. S. 527, and cases cited; *Re Russell*, 52 L. T. N. S. 559.]

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

MARKLE v. DONALDSON.

Master and Servant—Injury to Servant—Negligence—Unsafe Method—Absence of Knowledge of Master—Workmen's Compensation Act—Defects in "Ways, Works," etc., of Building—Negligence of Workman—Person Intrusted with Seeing that Condition of Ways Proper.

Appeal by defendants from order of a Divisional Court (3 O. W. R. 147, 7 O. L. R. 376), setting aside a nonsuit entered by FERGUSON, J., at the trial at Hamilton, and directing a new trial of an action by a workman against his employers to recover damages for injuries sustained in the course of his employment, by reason of the alleged negligence of defendants in the condition of a cleat upon the roof of a house which plaintiff was shingling.

W. R. Riddell, K.C., for appellants.

G. Lynch-Staunton, K.C., for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.); was delivered by

MACLENNAN, J.A.— . . . The question turned upon sec. 3 (1) of the Workmen's Compensation Act, as qualified by sec. 6 (1) of the same Act.

According to the evidence, if believed, the plaintiff fell in consequence of a cleat which had been placed in the roof to support the workmen, had been insufficiently nailed or secured to the sheeting, and gave way under the weight of the plaintiff's body, whereby he fell and received his injury.

The cleats used were for the sole purpose of supporting the workman and the shingles and materials used by him while he was at work, and to be removed when the work

was done. They served a temporary purpose—the same purpose as a scaffold. They were, therefore, a “work” or “plant” “connected with, intended for, or used in” defendants’ business, within the meaning of the statute. This would be so even if they had been put in place by plaintiff. There was evidence, however, that the cleat in question was in position, and was not properly secured, when plaintiff went upon the work, and had been so placed and left unsecured on a former day by persons in the employment of defendants. When plaintiff began his work he had a right to assume that the work previously done, including the means provided for the safety of the workman, had been done with care, and without negligence. In these circumstances we do not see how it can be contended that the person who put the cleat in position was not a person intrusted by defendants with the duty of seeing that the condition of the works, etc., was proper. . . .

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

SASKATCHEWAN LAND AND HOMESTEAD CO. v.
LEADLEY.

SASKATCHEWAN LAND AND HOMESTEAD CO. v.
MOORE.

Appeal to Court of Appeal—Leave to Appeal—Question of Practice—Use of Company’s Name as Plaintiff in Actions—Discretion.

Motions by defendants for leave to appeal from orders of a Divisional Court (ante 39) allowing appeals by plaintiffs from orders of FALCONBRIDGE, C.J. (3 O. W. R. 191), varying orders of Master in Chambers (3 O. W. R. 133), and holding that the name of plaintiff company may be used by certain shareholders.

A. J. Russell Snow, for defendant Moore.

J. W. St. John, for defendants the Leadleys.

R. J. MacLennan, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A.) was delivered by

MOSS, C.J.O.—The question involved is in a certain sense a question of practice merely, and is not likely to affect the ultimate rights of the parties.

Defendants have by no means made it apparent that the majority of the shareholders are opposed to the actions, or that they do not desire them to be proceeded with in the name of the company. But, if it be assumed that defendants are able to shew that the name of the company is being used as plaintiff contrary to the wish of the majority of the shareholders, that would not end the litigation, but would merely alter the form of the actions. Enough is shewn to enable it to be seen that the actions are being prosecuted with the sanction of a large body of the shareholders. The decision of the Divisional Court goes no further than to determine that, in the facts of these cases, the actions should be allowed to proceed as framed. No rule of practice has been seriously interfered with . . . and the decision has established no precedent likely to be of general application. There are no grounds upon which the discretion to permit the matter to be considered further should be exercised.

Motion dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

RE BADEN MACHINERY MANUFACTURING CO.

Company—Winding-up — Contributories — Shares—Payment—Evidence of.

Appeal by Charles Hood and A. J. Snow from order of FERGUSON, Jt, 3 O. W. R. 190, dismissing their appeal from report of local Judge at Berlin, in a winding-up reference, placing them upon the list of contributories for \$2,500 each.

R. S. Robertson, Stratford, and R. F. Segsworth, for appellants.

J. C. Haight, Waterloo, for liquidator.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A.), was delivered by

MOSS, C.J.O.— . . . The appellants' contention is that the shares are fully paid up. It is admitted that they were not paid for in cash, but it is contended that they were issued to them as fully paid up shares, in consideration of the transfer by them or on their account of certain property to the company after its formation. They claim to have acquired the property in question by purchase from a firm of Oelschlager Bros., who for some years prior to the formation of the company had been carrying on the business of

manufacturers of engines, boilers, and other machinery in the town of Baden. The firm had been doing business with the Buffalo Tool and Machine Co., in which company Hood was interested and of which he was treasurer. Oelschlager Bros. were not prospering in their business, and appearances seemed to indicate that it must come to an end. For reasons pertaining to the business of the Buffalo Machine and Tool Co., Hood was anxious to prevent the business terminating. He associated with himself the appellant Snow, and one Oliver Masters, and made arrangements for the purchase of the Oelschlager Bros. property for the purpose of an intended joint stock company, of which Hood, Snow, and Masters were to be provisional directors. And a memorandum of agreement for the formation of a company under the Ontario Joint Stock Companies Act was signed by Hood, Masters, and one William Cram, on 26th July, 1902, and by Snow on 29th July, 1902.

Hood, Snow, and Masters then joined in a writing authorizing Cram as their attorney and trustee to obtain for them the property of Oelschlager Bros. to be acquired and held for the purposes of the intended company.

Cram procured a bill of sale of the property from Oelschlager Bros., dated 4th August, 1902, the stated consideration being \$1,155, paid to the vendors, and the assumption of the registered incumbrances against the property—but it appears that that sum was not paid to Oelschlager Bros., and Henry Oelschlager testified that the firm transferred the property to Cram for the intended company, which was to assume all the indebtedness of the firm, as he understood.

To enable some of the claims against the property to be paid, Hood made a promissory note in favour of Masters for \$2,000, dated 6th August, 1902, payable 3 months after date. This note was discounted, and some part of the proceeds used in paying liabilities of Oelschlager Bros. But this left unpaid certain liens and registered claims against some parts of the property, and on 13th September, 1903, Cram made a draft on the Buffalo Tool and Machine Co. in favour of Masters for \$1,200, which was accepted, and, being discounted by Cram at the Bank of Hamilton in Berlin, the proceeds were applied in paying certain liens and incumbrances, which were transferred to the bank. This draft was afterwards paid by the Buffalo Tool and Machine Co., which thus became entitled to and received the benefit of the securities held by the bank. Other drafts were made upon and accepted by the Buffalo Tool and Machine Co., but it is not material to follow them further.

On 27th August, 1902, the letters patent incorporating the Baden Machinery Manufacturing Company, Limited, were issued, the incorporators named being Hood, Snow, Masters, Cram, and one Charles Henry Carter. The provisional directors were Hood, Snow, and Masters. All the above named persons had previously become subscribers to the memorandum of agreement for the formation of the company. By this memorandum Hood and Snow each subscribed for and agreed to take \$2,500 of shares in the company.

On 4th October, 1904, the provisional directors held a meeting at which it was decided to call a general meeting of the shareholders for 17th October for the purpose of organization. The minutes of the meeting also record that it was resolved to demand from Mr. W. Cram, one of the promoters of the company, a transfer of all property purchased by him as trustee for the company since incorporated, transferring such property to the said company, and to require the said Cram to give an account of all property and moneys passing through his hands since he acquired the said property.

The meeting of shareholders was held on 17th October, but the minutes have no record of any further action with regard to the transfer of the property by Cram to the company.

By bill of sale dated 4th October, 1902, between Cram, of the first part, and the company, of the second part, after reciting that Cram was possessed of the property therein described as trustee for Hood, Cram, and Masters, purchased for the purpose of forming a joint stock company, and that the company had been formed, and that Hood, Snow, and Masters, provisional directors, had demanded a transfer to the company in fulfilment of the trust, it was witnessed that Cram sold, assigned, and transferred the said property to the company.

And Hood and Snow now set up and claim that this transfer was made in consideration of the issue to them of the amount of the shares subscribed for by them as fully paid up shares.

But neither in the minutes of the company nor elsewhere is there any record of any bargain or agreement to that effect between the company and Hood and Snow. Oral testimony was given to shew that at the meeting of shareholders on 17th October some explanation was given by Hood to the shareholders present, of some arrangement or understanding

whereby his and Snow's shares were to be issued as fully paid up shares. Even if this evidence could be permitted to supplement the record of the minutes, which may well be doubted, for there is nothing to shew that the minutes were not properly kept, it is not undisputed, and it is of too vague and general a character to establish an agreement.

It does not appear to have been stated in the documents on the application for the letters patent that any amount had been paid in on shares taken by transfer of property to a trustee. See the Ontario Companies Act, sec. 10 (3).

But the conclusive answer to the appellants' contention is, that it is clearly shewn that the purchase of the property from Oelschlager Bros. was not made for Hood and Snow, but for the company.

It is to be observed that the only moneys for the purchase derived from them were the proceeds of the \$2,000 note made by Hood. But it was agreed that this note was to be assumed and paid by the company. It was in fact to be treated as representing some of the firm's liabilities which the company was to assume. And on 1st November, 1902, the company made its promissory note for \$4,000, which was discounted at the Western Bank, and out of the proceeds thereof Hood's \$2,000 note was retired and handed over to him.

The evidence goes to shew that this was the agreement and understanding from the first, and Hood admits that it was so arranged at the time when the company was formed, and that the \$2,000 note was merged in the \$4,000 note made by the company.

This being so, any other arrangement made for issuing to Hood and Snow their shares as fully paid up was an arrangement for giving them to them for nothing.

Further, this evidence wholly displaces the contention that the property was the property of Hood and Snow, and was transferred by them in payment of their subscribed shares. In fact the property was purchased for the company, and any advance made by Hood for the purpose was agreed to be assumed and was assumed by the company.

In view of these facts, the issue to Hood and Snow of certificates of fully paid up shares was a mere form, and could not bind the company or the liquidator.

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

COULTER v. EQUITY FIRE INS. CO..

Fire Insurance—Oral Contract—Interim Receipt—Insurance for 30 Days—Application for Insurance for One Year—Acceptance by Agent of Premium for One Year—Knowledge of Insurers—Estoppel—Statutory Conditions—Omission to Disclose Incumbrances—Immateriality.

Appeal by defendants from judgment of MEREDITH, C.J. (3 O. W. R. 194, 7 O. L. R. 180), in favour of plaintiffs in an action upon a fire insurance policy.

G. H. Watson, K.C., for appellants.

W. R. Riddell, K.C., and S. B. Woods, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.), was delivered by

GARROW, J.A.—The learned Chief Justice apparently found upon conflicting evidence, clearly involving the question of credibility, that defendants accepted plaintiffs' application for an insurance for one year at a premium agreed upon, and paid, and with that finding, so based, we cannot, or at least ought not to, interfere.

The transaction took place at defendants' head office with their general manager, and the proposal and acceptance, followed by payment of the premium, in such circumstances, were, although by parol, quite sufficient to constitute a valid and binding contract of insurance capable of enforcement: *Perry v. Newcastle M. F. Ins. Co.*, 4 U. C. R. 363; *Jones v. Provincial Ins. Co.*, 16 U. C. R. 477; *London Life Ins. Co. v. Wright*, 5 S. C. R. 513; *Porter on Insurance*, 2nd ed. (1889), p. 20; *Joyce on Insurance* (1897), sec. 31 et seq.; *R. S. O. 1897*, ch. 203, sec. 2, sub-sec. 37. Formerly, of course, the remedy would have been in equity to compel delivery of a policy and consequential relief, but now, since the Judicature Act, all the Courts have equitable jurisdiction, and are bound to act upon and enforce equitable as well as legal rights.

Assuming, then, that there was a binding contract to insure for one year, the burden was clearly upon defendants to shew that something had occurred after that contract was made to modify or end it before the fire, which took place within the year, and in that I think defendants entirely fail.

to judge of the risk about to be undertaken. Such information is usually obtained by answers in writing to questions in a written application, although, doubtless, verbal questions and answers would serve the purpose, and if no questions are asked it is to be assumed, in the absence, of course, of fraud, that the company is willing to accept the risk without such information, or that the company has otherwise satisfied itself as to the title.

There were here no written application and no questions or answers, written or verbal, and there was, therefore, in my opinion, no duty to communicate, within the meaning of the condition and variation. See *Klein v. Union Fire Ins. Co.*, 3 O. R. 234.

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

CITY OF TORONTO v. MALLON.

Landlord and Tenant—Action for Rent—Agreement for Lease—Refusal to Sign Lease—Taking Possession—Possession Referable to Agreement.

Appeal by defendants from judgment of *MACMAHON, J.*, 2 O. W. R. 933, in favour of plaintiffs.

G. F. Shepley, K.C., and J. E. Day, for appellants.

J. S. Fullerton, K.C., and W. C. Chisholm, for plaintiffs.

The judgment of the Court (*MOSS, C.J.O.*, *MACLENNAN, GARROW*, *MACLAREN, J.J.A.*), was delivered by

MACLAREN, J.A.—Defendants have appealed from the decision of the trial Judge, which held them liable for \$217, being for 3 months' rental of stalls 2 and 72 in the new St. Lawrence market, less \$200, the amount of a cheque deposited by them when these stalls were knocked down to them at the auction on 27th August, 1902.

The appeal is based on a number of grounds; that most strongly urged being the alleged misrepresentation by the city officials who had charge of the matter, before or during the auction sale, that no fresh meat would be permitted to be sold in that portion of the market south of what is called the gangway. Stress is also laid by defendants on the fact that on the day of the auction and before it came off, *Alderman Lamb*, the chairman of the sub-committee which was

appointed to look after this matter, had received a written offer from the William Davies Co. for space south of the gangway, where fresh meat might be sold by them, which offer was subsequently accepted and acted upon by the city council.

At the auction, all the stalls north of the gangway, 20 in number, being the only ones which were then fitted up, were put up for one year from 1st October, 1902, and stalls 2 and 72 were knocked down to defendants' agent for a monthly rental of \$94 and \$45 respectively. He signed an agreement to execute a lease, and deposited defendants' cheque for \$200, which had been previously given him for that purpose.

These two stalls were the first that were put up. Later in the sale, stall 74 was bid in by one of defendants' employees for \$14, and an agreement signed by Mr. Mallon personally. However, defendants did not take possession of this stall, and the claim of the city with respect thereto was dismissed by the trial Judge, and from this there has been no appeal.

There can be no doubt that the prices at which stalls 2 and 72 were bid in were grossly extravagant. The reserve bids placed upon them by the city were respectively \$25.67 and \$19.83, and the trial Judge has found on the evidence that a fair rental would have been \$50 a month for the two...

There had been a previous auction sale of stalls in this market on 18th March, 1902. The results of this sale and of private arrangements for leases were embodied in a report of the property committee, which was adopted by the city council on 7th April, 1902. In this report defendants were down for 4 stalls immediately south of the gangway, at an aggregate rental of \$50.75 a month. Stalls 2 and 72 were at this time allotted to other persons for \$30 and \$20 respectively. The defendants and the other lessees were notified to call at the city solicitor's office and sign their leases, but it appears that none of them did so, and the whole arrangement was cancelled. At this time none of the stalls was fitted up. The 4 then allotted to defendants were part of the 6 subsequently leased to the William Davies Co. in August, by private arrangement.

Several witnesses testify that at the last auction sale either the auctioneer or Alderman Lamb or Alderman Richardson stated that no fresh meat would be allowed to be sold south of the gangway, and that any butchers who wished to secure stalls for such a business must bid at that auction. Mr. Mallon does not say that he heard this at the auction

sale, but that it was said to him by Alderman Lamb before the day of the sale.

Each of these persons strongly denies that he made any statement, or that he heard such a statement made. The trial Judge finds against the defence on this point, and is of opinion that the impression conveyed to intending buyers that sales of fresh meat would not be allowed south of the gangway, probably arose from the fact that the stalls put up for sale on 27th August were north of the gangway, and that that was the place in which the butchers would have to carry on their business.

The defence also calls special attention to the fact that the plan according to which the sale took place had the words "pork and provisions" marked upon the stalls immediately south of the gangway, including those leased to the William Davies Company. As pointed out by the trial Judge, none of these stalls was fitted up, and none was offered for sale on that day, and a large number of them did not appear to have been set apart for any particular business, and might have been devoted to almost any trade.

At the close of the sale Mr. Mallon heard of the offer of the William Davies Company for the stalls south of the gangway, and that it was likely to be accepted. The next day he stopped payment of the \$200 cheque, and wrote to the mayor that he had decided not to take the stalls in the new market, as he had not been aware that favouritism had been shewn to one tenant more than another, and for other reasons.

As pointed out by the trial Judge, if the matter had ended there, plaintiffs' action would have failed. Defendants remained on in the old market, where they had been for over 30 years, until 15th November, 1902, when plaintiffs began to pull it down, and they were obliged to move. They took possession of stalls 2 and 72, which they had purchased on 27th August, apparently without making any other arrangement or agreement. Matters appear to have remained in this position until about the middle of February, 1903, when the city treasurer requested defendants to allow the cheque in his possession to be paid. Their solicitor wrote in reply that payment would be allowed without prejudice to defendants' rights in the matter, and upon the understanding that the proceeds of the cheque should be applied on account of the rent to be fixed and agreed upon between them and the city with respect to the stalls which they were occupying. Negotiations followed but without result, and on 12th May the city issued a writ. . . .

The case is undoubtedly one of great hardship for the defendants. By a combination of circumstances, for which the city cannot be held responsible, they were led in a state of panic to enter into agreements for the leasing of these two stalls at prices which the chairman of the property committee describes as "ridiculously high." With full knowledge they voluntarily entered into possession without protecting themselves in any way. They allowed the city treasurer to obtain payment of their cheque by the letter of 16th February, 1903, and the cashing of this cheque by him would not have been conclusive evidence against the city even if he had power to bind it: *Day v. McLea*, 23 Q. B. D. 610; *Mason v. Johnston*, 20 A. R. 412. They apparently trusted to being able to make satisfactory arrangements with the city, which they subsequently were unable to accomplish.

On the whole I am of opinion that the judgment appealed from is correct and ought to be affirmed.

NOVEMBER 14TH, 1904.

C.A.

GRATTAN v. OTTAWA ROMAN CATHOLIC SEPARATE SCHOOL TRUSTEES.

Schools—Separate Schools—Qualification of Teachers—Religious Community—Ante-Confederation Status—Contract—Invalidity—Residence of Teacher—Payments for Furnishing—Duration of Contract—Erection of School House.

Appeal by defendants from judgment of MACMAHON, J., ante 58, 8 O. L. R. 135, granting an injunction restraining defendants from constructing a school building such as proposed by a contract entered into between defendants and the Brothers of the Christian Schools for the direction of boys' separate schools for the parish of Nôtre Dame in the city of Ottawa, and from carrying into effect the provisions of the contract, upon the ground that the employment of the Brothers as teachers without certificates was illegal. A question was raised involving the construction and meaning of a clause of the Separate Schools Act permitting the employment of "persons qualified by law as teachers" at the time of the passing of the British North America Act. The appeal was limited to the question of the right of defendants to engage the Christian Brothers as teachers.

G. F. Shepley, K.C., for appellants.

G. F. Henderson, Ottawa, and D. O'Connell, Peterborough, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.), was delivered by

MOSS, C.J.O.—. . . As the learned Judge's opinion that defendants are not authorized or permitted to engage any of these persons who has not passed the examinations and does not hold the certificate of qualifications prescribed by sec. 78 of the Public Schools Act, was only one of several grounds upon which the contract was adjudged invalid, and as the other grounds appear, and indeed, are conceded to be, quite sufficient to sustain the formal judgment, the present appeal seems to be directed against one of the reasons rather than against the judgment itself.

And it might suffice for the disposition of the appeal to hold that the judgment should be affirmed upon the grounds which are not attacked. Upon the broad ground that defendants are not authorized to engage with any person or body of persons in a contract such as proposed, and that its whole scope is beyond the powers of the defendants, as well as upon the grounds referred to by the learned Judge apart from the question of the engagement of the Brothers of the Christian Schools, the contract is invalid, and defendants were rightly enjoined as directed by the judgment.

But all parties joined in expressing a wish for an opinion upon the question of the right of defendants to employ as teachers in their schools Brothers of the Christian Schools who have not passed the examinations and do not hold the certificates of qualification referred to.

On behalf of defendants it is urged that the learned Judge put an erroneous construction upon sec. 36 of the Separate Schools Act, R. S. O. 1897 ch. 294. This enactment had its genesis in sec. 13 of 26 Vict. ch. 5. It next appeared with a variation in sec. 30 of ch. 206 of R. S. O. 1877, and was first enacted in its present form as sec. 62 of 49 Vict. ch. 46.

At the time of the passing of 26 Vict. ch. 5, the provision with regard to teachers' qualifications was sec. 28 of C. S. U. C. ch. 65, by which it was enacted that a majority of the trustees of separate schools in townships or villages, or of the board of trustees in towns or villages, should have power to grant certificates of qualification to teachers of separate schools under their management. . . .

The question must be determined upon the proper construction to be placed upon the words of the section as it now appears.

The general policy declared by the later enactments was to require that teachers of separate schools should undergo the same examinations and receive the same certificates as common school teachers. But it was thought proper to exempt some persons from its immediate operation. Evidently the persons aimed at in this Province were individuals holding certificates granted by trustees under the consolidated statute, and authorized to teach or engaged in teaching by virtue thereof. The word "persons" is to be read as individuals and as applying to individuals thus qualified by law as teachers. On ordinary principles of construction, the word ought to be given the same meaning as regards those aimed at in the Province of Quebec. And there is nothing in the words of the Act pointing to a different or more extended meaning in regard to that Province. On the contrary, the language seems intended to confine the meaning to individuals. As it now reads, it is "the persons," i.e., the individuals, specifically denoted by the use of the definite article. The period of their existence is limited and circumscribed. Not all persons qualified by law as teachers, but the individuals so qualified at the time of the passing of the British North America Act, are to be considered qualified for the purpose of the Act. It is no doubt the case that when 26 Vict. ch. 5 was passed, there were persons falling within the description in the proviso of sec. 50 of 9 Vict. ch. 27 (which was applicable only to the Province of Lower Canada) engaged in teaching in this Province, but there was nothing in the law preventing them from accepting the grant of certificates of qualification by trustees under the consolidated statute. And possibly without such a certificate they could not engage in teaching in this Province, though an examination might not be a necessary preliminary to its grant. Thus they would become qualified by law as teachers either in Upper or Lower Canada.

The Legislature in 1886, and again in 1897, recognized, and perhaps not without reason, that not improbably there were still surviving some individuals who were within the category of persons qualified as teachers under the law as it existed at the time of the passing of the British North America Act. and for their benefit carried forward the saving clause. And where, as in this enactment, there is found in unambiguous language a general declaration as to the qualification required, any restriction upon that declaration should not be extended beyond what the language, construed in the ordinary and natural meaning of the words, and in the light of the context, clearly requires.

Thus treating the section in question, it does not appear that the learned Judge has come to an erroneous conclusion. Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

MONRO v. TORONTO R. W. CO.

Partition—Lease by Infant Tenant in Common—Repudiation—Partition by Deed among Tenants in Common—Effect as to Lessees — Reformation of Deed — Trial — Adjournment—Evidence at Former Trial and on Reference—Ouster—Conduct Amounting to—Mesne Profits—Waste—Damages — General Costs — Costs of Proceedings under Order of Reference Subsequently Reversed—Costs of Appeal—Variation of Judgment.

Appeal by defendant company from judgment of TEETZEL, J. (3 O. W. R. 14), in favour of plaintiff for partition of Monro Park, near the city of Toronto. The partition sought was between plaintiff and defendant company for the remainder of the term of a lease to defendant company, which was not binding on plaintiff, as he was an infant when it was made.

J. Bicknell, K.C., and J. W. Bain, for appellants.

F. Arnoldi, K.C., and G. F. Shepley, K.C., for plaintiff.

S. B. Woods, for defendant Amy Monro.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

MOSS, C.J.O.— . . . It was strongly urged that no case had been made for reformation of the conveyance, and that defendant railway company ought not to be deprived of any benefit which it had derived thereunder. But it is manifest, as well from the testimony as from the whole circumstances, that there was no intention on the part of any of the parties to the conveyance to take from plaintiff any part of his rights as the owner of an undivided one-third of the premises, or to give any of his property or rights to his brother and sister, so as to increase their property and rights and leave him with less than each of them was to have. Neither his brother nor sister contends that there was any such intention or that they understood that to be the effect of the conveyance.

The evidence of the solicitor who acted for plaintiff and prepared the conveyance goes to shew that the only object was to make a partition, leaving the lease to stand as it then stood. It was not intended to affect the railway company as lessee of two undivided one-third shares. And if the general words of grant and release contained in the conveyance operate to take away from plaintiff or to convey to his brother and sister any right of his in the premises during the existence of the term, it is proper and just to reform it so as to prevent it from so operating. The railway company cannot reasonably complain of this being done. Throughout the litigation they have contended, and their contention has been upheld by all the Courts, that the partition made was not binding on them. So far as the railway company were concerned, it was *res inter alios acta*. Then, as the railway company were not parties to or bound by it, how can they insist that the conveyance made must stand for their benefit, even though it be shewn or admitted to be contrary to the intention of the parties to it? The railway company gave no new consideration, and their position has not altered. They hold their lease and their leasehold interest unaffected by the partition. . . . The railway company would not be permitted to take for their benefit the property of plaintiff because by mistake he had executed a conveyance which appeared to give rise to a claim to that effect.

Upon the facts as now disclosed, the good faith of the parties must be taken as established. . . . What the plaintiff and his brother and sister desired and intended neither prejudiced the railway company nor furnished it with any defence to plaintiff's claim to a partition of the premises during the term.

It was further objected that without the evidence given at the former trial and in the Master's office there was not evidence to support the charge of ouster of plaintiff, or on which to found the award of damages and mesne profits, and that the trial Judge ought not to have received that evidence. For plaintiff it is argued that, as regards the evidence taken at the former trial, there was only an adjournment of the trial and a continuation of it on the later occasion. A reference, however, to the judgment of Meredith, C.J. (4 O. L. R. 36, 1 O. W. R. 25), shews that he did not contemplate or direct an adjournment of the trial. An adjournment of a trial after it has been begun and evidence has been taken, ordinarily means a resumption before the same Judge at the point where it had been left. In

this instance the judgment pronounced directs that the action — not the trial — do stand adjourned to add parties and amend the pleadings. And in the next paragraph the costs are reserved to be disposed of by the Judge before whom the action is ultimately tried. These provisions are entirely at variance with the notion that there was an adjournment of the trial so as to entitle plaintiff to put in and use the evidence taken on the former occasion. The effect was the same as when a new trial is ordered. And, unless by consent or on proof of the death or absence from the jurisdiction and consequent inability to procure his attendance at the trial, the deposition of a witness taken at the former trial could not be received. And so with regard to the depositions taken in the Master's office. None of the usual grounds for admitting any of the depositions was made, and, the railway company refusing to consent, they were not admissible.

The question then is, whether the evidence given at the trial was sufficient to support the judgment. . . . There is enough to remove all difficulty and objection based on the partition proceedings between plaintiff and his brother and sister.

The partition made by the trial Judge is in accordance with the evidence, and appears to be fair and equitable as regards the railway company. It enables the company to make the best use of the premises for the purposes for which it acquired them, and calls for the least disturbance of the present arrangements.

Whether or not there was an ouster is a mixed question of fact and law. From the date of his repudiation of the lease plaintiff was entitled to possession of the whole of the premises in common with the railway company, who were bound upon demand to let him into possession along with them. On 17th August, 1900, plaintiff wrote to the railway company stating his repudiation of the lease and asking the company to give him immediate possession. This demand must be reasonably construed as a claim not for the sole but for the joint possession, and it is apparent from the company's letter in reply of 20th August that it was so understood. The demand was not assented to, but it was sought to induce plaintiff to confirm the lease and accept the rent under it. The railway company had at that time their buildings and tracks upon the premises, and after the demand they continued in possession and used the property in the same way as before. It is a fair inference from all the facts that there was a refusal to permit plaintiff to enter. And when this action was brought, there is not only a refusal of posses-

sion on the part of the railway company, but there is a denial of his title. The lease is insisted upon as valid and binding upon him, and in argument the provisions of the Settled Estates Act were invoked against him. This is continued and made even more evident by the amended statement of defence. The railway company thus put themselves in the position of one tenant in common in possession claiming the whole and denying possession to the other. These alone, without reference to the manner of the company's user of the premises, which in itself amounts to a virtual exclusion, are acts and conduct from which an ouster may properly be inferred: *Doe Hellings v. Bird*, 11 East 49; *Freenman on Co-tenancy*, secs. 235, 236.

Ouster being found, damages either as for trespass or by way of allowance for mesne profits should follow, and upon the evidence as to the value and rental of adjoining properties it cannot be said that the trial Judge has made an excessive award. . . . There is some slight evidence of waste destructive of the freehold, and the amount awarded on this head (\$50) should not be disturbed. . . .

For the railway company it is argued that the trial Judge improperly awarded the general costs of the action to plaintiff; . . . first, that the litigation was due to the fault of plaintiff, and second, that in any case a partition and consequent relief could have been obtained upon summary proceedings.

In view of the attitude assumed by the railway company, it is difficult to see how it can be made to appear that plaintiff was in fault in resorting to litigation. His rights were not admitted, and he was being excluded from all enjoyment of the property. As it turned out, it was even necessary for him to obtain a declaration that the lease was not binding upon him before he could proceed to obtain a partition or any other relief. For similar reasons and on similar grounds he could not have obtained relief in a summary proceeding. . . .

It does not appear that the trial Judge departed from principle in dealing with these costs. But as regards the costs of the reference and the appeals and motions relating thereto, which by the certificate of this Court were reserved to be disposed of by the trial Judge, the matter is different.

The reference was directed by the order of the Divisional Court (4 O. L. R. 36, 1 O. W. R. 316), which was afterwards reversed in this Court (5 O. L. R. 483, 2 O. W. R. 207). It had been proceeded with notwithstanding the stay of proceedings by reason of the pendency of the appeal. The pro-

ceedings fell with the reversal of the order directing them. This Court dealt with the costs so far as to reserve them to be disposed of by the trial Judge, in the hope that at the trial or otherwise during the further conduct of the action they might, by consent of all parties, be made available and serviceable in saving further delay and costs. And it was thought that in that case the trial Judge, having all the facts before him, and in view of the benefit or otherwise to any of the parties of these proceedings, would be in a position to deal with the costs in a more satisfactory way than they could otherwise be dealt with. Probably it would have been reasonable for the railway company to have consented to these proceedings being used, but the refusal was in the exercise of an undoubted right.

The result is, that the proceedings have turned out to be useless, and plaintiff, at whose instance they were taken, is not entitled to any of the costs connected with them. On the other hand, if the railway company had been successful in their defence, the costs would have been awarded to them as against plaintiff. But, considering that the railway company have failed in their defences, some of which should not have been set up at all, and having regard to all the other circumstances of the case, there should be no costs of the reference or of the motion and appeals with regard to it.

Success on the appeal being but partial, there will be no costs except to defendant Amy Monro, whose costs of the appeal will be paid by the railway company. She was not a party when the costs of the reference were incurred, and cannot be held responsible for the judgment as to them.

The judgment appealed from will be varied to the extent indicated.

NOVEMBER 14TH, 1904.

C.A.

LANGLEY v. KAHNERT.

Bankruptcy and Insolvency—Goods in Possession of Insolvent—Agreement with Owner—Option of Purchase—Sale or Agency for Sale—Bills of Sale Act.

Appeal by plaintiff from judgment of MEREDITH. C.J., 3 O. W. R. 9, 7 O. L. R. 356, dismissing action for return of goods.

W. R. Smyth, for appellant.

W. M. Douglas, K.C., and J. M. Ferguson, for defendant.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), dismissed the appeal with costs, agreeing with the judgment below.

NOVEMBER 14TH, 1904.

C.A.

CROWDER v. SULLIVAN.

Promissory Note—Illegal Consideration—Unreasonable Restraint on Marriage—Public Policy.

Appeal by plaintiff from judgment of STREET, J. (2 O. W. R. 1129, 6 O. L. R. 708), dismissing action by an unmarried woman against the administrator of the estate of Albert Rose, whose housekeeper plaintiff was, upon a promissory note for \$1,500 made by the intestate. The consideration was an agreement by plaintiff not to marry while the intestate lived.

STREET, J., held that the contract was one in restraint of marriage for an unreasonable period, and the consideration for the note illegal.

D. B. Maclennan, K.C., for appellant.

R. C. Clute, K.C., and W. B. Lawson, Chesterville, for defendant.

The judgment of the Court (OSLER, MACLENNAN, GARROW, JJ.A.), was delivered by

GARROW, J.A.— . . . Albert Rose was a farmer and a widower with one young daughter, when plaintiff in or about the year 1890 entered his service as housekeeper at \$8 per month. She was then about 23, and he about 57 years old. He died on 15th November, 1901, and had been for the greater part of the last year of his life insane.

In the year 1897 plaintiff was about to marry one Levere, when it was agreed that if she would remain with Albert Rose as long as he wanted her, or as long as he lived, it is put both ways in the evidence, he would either give her \$1,000 in cash, his promissory note for \$1,500, or remember her in his will. Plaintiff gave up her proposed marriage, and performed the agreement fully on her part. Albert Rose died intestate, leaving an estate of about the value of \$15,000 to his only child, the daughter before mentioned, then of the age of about 15 years.

On 19th September, 1900, Albert Rose, without any request from plaintiff, made and gave to her the promissory note now sued on, presumably in performance of his part of the agreement before referred to, and in the following month of December became insane and so remained. Plaintiff had throughout been paid the original wage of \$8 per month.

The evidence shews very clearly that her services were highly prized by Albert Rose, and that to several of the witnesses, friends and neighbours, he had announced his intention to provide for her in recognition of her long and faithful services. . . .

I think there are one or two slight omissions, or perhaps they might be called inaccuracies, in the learned Judge's summary. The first is in the statement that the bargain was specifically that plaintiff would remain with deceased as long as he lived. The evidence given by plaintiff on her examination for discovery used at the trial, and also upon her cross-examination at the trial, is that she promised to remain "as long as he needed me," and the statement that she would remain as long as he lived appears rather as an inference than as a fact expressly agreed upon.

On her cross-examination at the trial she says: Q. You were examined for discovery as to the bargain, by Mr. Lawson the other day? A. Yes, sir. Q. Did you tell the truth about it? A. Yes. Q. This is what you said about that? "Q. 88. Did you tell him who you were going to marry? A. Yes. Q. Who was it? A. Levi Levere. Q. He said he could not think of you getting married? A. Yes, he could not think of my leaving. He did not know what he should do. Q. He finally told you he would give you \$1,000, or \$1,500? A. Yes." Q. What were you to do in order to get this \$1,000? A. I was to remain with him, and I did so. Q. That is to say, you were not to marry Levi Levere at that time? A. Yes. Q. If somebody else came along were you at liberty to marry. Was that part of the agreement? A. Yes, I was to remain and not to get married to Levi Levere. Q. Nor any person else? A. Nor any person else while he needed me, and I did not. Q. There was no fixed time? A. No. Q. I want to be sure about this bargain, because it differs a little from the way it was stated in your statement of claim. You say four or five years previous to the making of the note you were about to get married? A. Yes. Q. And you acquainted Mr. Rose with the facts? A. I did? Q. And he told you he could not hear of it? A. Yes. Q. And at that time there was an agreement made between you, you were not

to get married to anybody as long as he needed you? A. Yes. Q. Is that all true? A. Yes. . . . Q. And you did not know how long you would have to stay with Mr. Rose? A. No, I did not know. Q. I suppose the intention was to stay during his lifetime? A. If he were living, I would stay. Q. That was the bargain, as long as he wanted you, you were to stay during his lifetime? A. Yes.

The other statement of fact which is not, I think, quite accurate, is as to the age of Albert Rose, which the learned Judge puts as about 60 years when the bargain was made in 1897. Albert Rose died in November, 1901, and his brother Samuel, who was examined at the trial, states that he was then of the age of 67 years. So that in 1897 his age was some three years greater than as stated by the learned Judge.

I cannot help feeling rather strongly that the defence is not a meritorious one. Plaintiff has fully performed the contract, and the intestate doubtless in giving his promissory note intended to perform his part. Defendant, it is true, is merely the administrator, and as such probably doing his duty in questioning as he has done plaintiff's right to recover. But the defence is essentially a dishonest one, and should only, in my opinion, succeed if it is established that the law has interposed an insurmountable barrier against her claim. The only general principle that I have been able to find is that a general restraint upon marriage is, on grounds of public policy, void, and possibly a second, if isolated instances may be trusted, that restraints which are not general but merely temporary or otherwise limited in their effect are not illegal unless unreasonable in extent. The present case falls within the second class, as pointed out by the learned Judge.

If the contract had not involved the postponement or abandonment of plaintiff's marriage, it would scarcely be contended that the contract was not an eminently reasonable and proper one. The deceased was a farmer carrying on a farm. He had no other housekeeper or female servant. He had a young motherless daughter to bring up. Plaintiff had been in his service for years when the bargain was made, and had approved her skill and faithfulness. It was, apparently, therefore a matter of prime importance to deceased, in the circumstances, to retain plaintiff's services if possible and at any reasonable price, at least until his daughter had grown older or his circumstances or mode of life had changed. There was the chance of his giving up farming (which actually happened shortly before his final illness), or even, at his age, of his marrying again; in either of which events plain-

tiff's services might, and probably would, have been dispensed with, and there was of course the other chance that he might not live long, and thus put a period to the restraint.

The parties were not bargaining expressly for a restraint upon the marriage, but, in substance, for the continued services of plaintiff as housekeeper; and the temporary interference with her marriage was at most merely an incident, or collateral result.

But, assuming that it had the effect and even that the parties had in contemplation a postponement of plaintiff's marriage as long as Albert Rose required her services, up to, if he elected, the close of his life, this was at most only a temporary restraint, and upon the authorities was not necessarily invalid. What is reasonable is not always easy to define. What I may regard as reasonable another with equal authority may regard as highly unreasonable. The question is usually one entirely of fact, and so for a jury where the trial is by a jury. But in another class of cases involving, like this, offences against what is called public policy—I refer to actions upon contracts in restraint of trade—the question has been called one of law and therefore for the Judge: see *Dowden v. Pook*, [1904] 1 K. B. 45.

But, whether the question is one of law for the Judge or of fact for a jury, the mode of treatment must be very much the same. There is no such thing in the abstract as reasonableness or unreasonableness. These terms can only have a meaning as applied to concrete circumstances. Then no two cases are wholly alike. Each has its own special atmosphere, so to speak, of reasonableness or the reverse, arising out of the facts and circumstances, and for this reason former decisions must be at best but faint guides to what must in the end be declared upon its special facts to be the law in any given case. Perhaps, from this point of view, the paucity of decisions, for there are not many, is an advantage rather than the reverse. In the case of *Lowe v. Peers*, 4 Burr. 2225, referred to in the judgment, it was held that the contract amounted to a general restraint, and for this reason was void. In the other case referred to, *Hartley v. Rjee*, 10 East 22, the question arose upon demurrer. The restraint there was for 6 years, but no facts to explain the reason or necessity for the limited restraint were stated, and it was held that in the absence of explanation the restraint was illegal. But it is quite apparent from a perusal of the judgment that the decision would, or rather might, have been the other way, if there had been a reasonable explanation to account

for the restraint, so that the case is scarcely an authority against plaintiff, but rather the reverse. . . .

[Reference to *Box v. Day*, 1 Wils. 59; *Woodhouse v. Shepley*, 2 Atk. 535.]

Restraints which are combined with gifts by will or settlements are also, of course, distinguishable. It is not unreasonable that a donor should be allowed some freedom to stipulate the conditions upon which he is willing to make the proposed gift. There no question of the freedom of contract is involved. But such cases may properly enough be looked at, and when looked at it appears to me that they shew a movement always towards greater freedom from the trammels of so-called public policy in this connection. And as an instance, the case of *Allan v. Jackson*, 1 Ch. D. 399, may not be without interest, where it was held that a restraint upon a man's second marriage was not illegal, it having been previously held that a similar restraint in the case of a woman was legal: see *Newton v. Marsden*, 2 J. & H. 856; see also *Perrin v. Lyon*, 9 East 170; *Jenner v. Turner*, 16 Ch. D. 188; *Jones v. Jones*, 1 Q. B. D. 179; *Robinson v. Ommamney*, 21 Ch. D. 786, 23 Ch. D. 285.

Upon the whole I am, with deference and after much consideration, unable to agree that the restraint in question was, in all the circumstances, unreasonable, or that it in any way invaded the policy of the law. No decided case brought to my notice, or which I have been able to find, compels me to an opposite conclusion. I entirely approve in this connection of the language of Jessel, M.R., in *Printing Co. v. Sampson*, L. R. 19 Eq. at p. 495, where he says: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not lightly to tamper with the freedom of contract."

And, in my opinion, the appeal should be allowed with costs here and below, and plaintiff should have judgment for the amount of the promissory note sued on and interest.

MACBETH, Co.J.

NOVEMBER 14TH, 1904.

COUNTY COURT MIDDLESEX.

RE LONDON DOMINION ELECTION.

Parliamentary Elections—Recount of Votes—Ballots—Irregularities.

Upon a recount of the votes cast at the London election for the House of Commons objection was taken to three ballots without the official stamp of the returning officer, and to five ballots from which the deputy returning officer had omitted to remove the counterfoils. The ballots were in other respects regular, and were counted and allowed by the deputy returning officer.

J. C. Judd, London, J. P. Moore, London, and R. A. Bayly, London, for applicant.

G. C. Gibbons, K.C., A. O. Jeffery, K.C., and J. E. Jeffery, London, for respondent.

MACBETH, Co. J., refused to disallow the ballots, following *Re South Grenville*, 14 C. L. J. 322; *Re Brockville*, 18 C. L. J. 324; *Re Muskoka and Parry Sound*, ib. 364; *Re Digby*, 23 C. L. J. 171.

 ANGLIN, J.

NOVEMBER 15TH, 1904.

TRIAL.

O'DONNELL v CANADA FOUNDRY CO.

Malicious Procedure—False Arrest and Imprisonment—County Constable—Absence of Malice and of Notice of Action—Responsibility for Arrest—Special Employment and Payment of Constable—Labour Troubles—Picketting.

Action for false arrest and imprisonment. Plaintiff joined as defendants one Wilson, the county constable by whom he was arrested, and the Canada Foundry Co., by whose instructions and on whose behalf Wilson, as alleged, effected plaintiff's arrest.

At the trial defendants moved for a nonsuit, and judgment was reserved, the case being allowed to go to the jury, who gave a special verdict in favour of plaintiff.

J. G. O'Donoghue, for plaintiff.

G. H. Watson, K.C., for defendants.

ANGLIN, J.—. . . The only grounds urged in support of the motion which it seems to me necessary to consider are the following:—

As to Wilson, that, being a peace officer, he is entitled to the protection of the statute, and that plaintiff has failed to prove notice of action, and has given no evidence upon which a jury could find malice.

As to the Canada Foundry Co., that there is no evidence upon which a jury could properly find that they expressly instructed or impliedly authorized the arrest of plaintiff or his subsequent detention. . . .

The arrest of plaintiff and his detention were clearly proven. Defendants failed to establish that plaintiff had committed any offence justifying such arrest. Defendant Wilson is a county constable, and, upon defendant company agreeing to pay him for his services, was sent by the chief constable of the county of York to the premises of his co-defendants, upon their request, for protection against strikers and their sympathizers, a strike of the company's employees being in progress. Plaintiff was arrested by Wilson upon a charge of "picketing" on the morning of 16th July, 1903. It is not pretended that any express instructions were given for this arrest by or on behalf of the company. But it is urged that the arrest and detention were within the scope of Wilson's employment by the company, and were effected for their benefit and in the discharge by Wilson of his duties as their paid servant. Wilson himself, called as a witness for plaintiff, swore that he received his instructions from the chief constable, and that pursuant to those instructions and in the discharge of his duties as a peace officer he did the acts which form the basis of plaintiff's claim. He swore that he made the arrest in good faith, and that he bore no malice or illwill to plaintiff, and believed him guilty of an offence. Constable Ford, who was with Wilson and arrested plaintiff's companion, was also called as a witness for plaintiff. He said that the arrests were made pursuant to the orders of the Crown Attorney. Mr. Wall, the assistant general manager of defendant company—another witness called for plaintiff—swore that Wilson did not receive from the company any authority to make arrests, and that the company had nothing to do with the proceedings taken against plaintiff. Plaintiff failed to prove any notice of action to Wilson.

Upon the evidence . . . no jury could, in my opinion, properly find that in arresting and detaining plaintiff Wilson was acting otherwise than as a county constable dis-

charging his duty as a peace officer, or that he was acting within the scope of an authority conferred upon him by his co-defendants.

To succeed as against Wilson, therefore, plaintiff must establish notice of action (R. S. O. ch. 88, sec. 14), and that he acted maliciously and without reasonable and probable cause (sec. 1). He has not proved malice. The evidence is not such as would justify a finding of malice—in the sense of wilfulness in doing a wrongful act, still less in the sense of personal spite or ill will. and I much doubt whether it is sufficient to sustain a finding of want of reasonable and probable cause. Upon these grounds plaintiff, in my opinion, entirely fails as to his claim against the constable Wilson.

As to the Canada Foundry Co., unless every citizen who, apprehensive of danger to his person or property, asks to have a constable detailed to give special attention to his premises, offering to remunerate the constable for his time so spent, thereby assumes responsibility for every arrest which such constable, acting upon his own judgment, may make in the discharge of such duties, and must be treated as having impliedly authorized such arrests, liability for Wilson's acts in the present case cannot attach to his co-defendants. There is no evidence that they did more than seek protection for their property from the chief constable. Any officer detailed for this duty would, while so employed, lose opportunities of earning fees for the discharge of his ordinary duties as a constable. It is not unreasonable that compensation for such loss should be made by the person at whose instance it is incurred. This is, I think, all that can be legitimately deduced from the fact established in evidence that the company made some payment to Wilson. The evidence would not, in fine, warrant a finding that Wilson in arresting and detaining plaintiff acted within the scope of an authority conferred upon him by defendant company.

Action dismissed with costs.

NOVEMBER 16TH, 1904.

DIVISIONAL COURT.

BANK OF NEW BRUNSWICK v. MONTROSE PAPER CO.

*Summary Judgment—Promissory Note—Renewal—Banking
—Notice—Leave to Defend.*

Appeal by defendants from order of Judge of County Court of Lincoln granting plaintiffs' application for sum-

mary judgment under Rule 603 in an action upon a promissory note.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

J. Bicknell, K.C., for defendants.

W. H. Blake, K.C., and W. S. Lane, St. Catharines, for plaintiffs.

STREET, J.—. . . The action is upon a note for \$540.98, dated 30th April, 1904, at St. Catharines, made by defendants, payable one month after date, at the Imperial Bank there, to the order of the St. John Sulphite Pulp Co., and indorsed by them to plaintiffs.

The secretary-treasurer of defendant company filed an affidavit stating that he had a knowledge of the matters therein deposed to; that the negotiation of the note sued upon was in fraud of defendants; that the note sued on was a renewal of a note made by defendants in favour of the St. John Sulphite Pulp Co. for \$537.54, which fell due on 1st May, 1904, held by plaintiffs; that plaintiffs have been paid the amount of that note, and are now in this action seeking payment of the renewal note; that he is advised by the St. John Sulphite Co. and believes that they left funds in the hands of plaintiffs for payment of the note for \$537.54; that defendants have received no value for the note sued on other than the renewal of the note due 1st May, 1904, and that defendants had notice thereof; that from his knowledge of banking arrangements he says that the discounting of the note sued on and the issue of a cheque by the St. John Sulphite Co. to pay that due on 1st May, 1904, which cheque was refused by plaintiffs, were, to plaintiffs' knowledge, one and the same transaction; and that he believes defendants have a good defence on the merits; and that the appearance has not been entered for the purpose of delay.

A few days before the note due 1st May, 1904, matured, defendants sent a renewal to the St. John Sulphite Pulp Co., which is the note now sued on. The note due 1st May, 1904, was then under discount with plaintiffs' bank; the St. John Sulphite Pulp Co. sent to plaintiffs the note now sued on for discount, and the proceeds were placed to their credit in plaintiffs' office at St. John, N.B.; at the same time they sent to defendants their cheque on the account with plaintiffs, to which these proceeds had been credited, to take up the note due 1st May, 1904, at St. Catharines. That cheque, upon being presented for payment, was refused by plaintiffs, who claimed a right to appropriate the proceeds of the discount

of the note sued on in payment of other debts due them by the St. John Sulphite Pulp Co. That company, having its head office in Scotland, had gone into voluntary liquidation there on 4th May, 1904.

It seems clear that, as between defendants and the St. John Sulphite Pulp Co., defendants were entitled to have the proceeds of the note sued on applied in payment of the note of which it was a renewal, and there is a positive statement, which is equally positively denied, that plaintiffs had notice of the circumstances. There is a further assertion that plaintiffs must have known that the note sued on was a renewal of the other; and there is the further contention that the course of business between the sulphite company and plaintiffs precluded plaintiffs from transferring a general liability at the debit of one account of the sulphite company in plaintiffs' books to the debit of their current account, without notice to the company, so as to put plaintiffs in a position to say there were no funds to meet the cheque given by the sulphite company to defendants in pursuance of their arrangement.

I do not think we can shut defendants out from having these questions determined in the ordinary way by a trial of the issues: see *Jacobs v. Booth's Distillery*, 85 L. T. 262, 5 O. W. R. 49; and the appeal should, therefore, be allowed, and the judgment which has been entered in the Court below should be set aside, and the parties must proceed to trial in the usual way.

The costs of the motion and of the appeal should be costs to defendants in any event.

BRITTON, J., gave written reasons for the same conclusion, referring to *Buckingham v. L. and M. Bank*, 12 Times L. R. 70.

FALCONBRIDGE, C.J., also concurred.

NOVEMBER 16TH, 1904.

DIVISIONAL COURT.

BARTON v. GILBERT.

Promissory Note—Payment—Collateral Security—Mortgage of Lease—Receipt of Rents by Creditor—Creditor Chargeable with Rents that might have been Collected.

Appeal by plaintiff from judgment of County Court of Prince Edward dismissing action upon a promissory note for

\$222 and interest, made by defendant, dated 16th January, 1894, to the order of Thomas C. Barton, plaintiff's testator.

The defences were the Statute of Limitations and payment.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

Allan Cassels, for plaintiff.

E. M. Young, Picton, for defendant.

STREET, J.—I am of opinion that we should not disturb the judgment appealed from. The deceased Thomas C. Barton was mortgagee of a lease as collateral security for the payment of the note sued on, and notified the tenant that the rent must be paid to him, and not to the original lessor, defendant. There is evidence that the rent due on 1st November, 1894, was in fact paid to the payee of the note by the tenant, and whether further payment was made by the tenant, or whether further rent which might have been had for the asking was lost because it was not asked for by the creditor, the creditor is chargeable with it under *Synod v. DeBlaquiere*, 27 Gr. 549, and the authorities referred to.

Appeal dismissed with costs.

BRITTON, J., gave reasons in writing for coming, with some hesitation, to the same conclusion.

FALCONBRIDGE, C.J., concurred.

CARTWRIGHT, MASTER.

NOVEMBER 18TH, 1904.

CHAMBERS.

MOSHER v. MOSHER.

Alimony—Interim Order—Disbursements—Foreign Defendant—No Assets in Jurisdiction—Provision for Wife.

Motion by plaintiff for interim alimony and disbursements.

D. L. McCarthy, for plaintiff.

W. J. Boland, for defendant.

THE MASTER.—Plaintiff admits having received from defendant \$1,350 in October, 1903, also \$50 a month down to and including June last. She admits she has still \$600 left. This was on 27th October. She was paying \$6 a week for room and board. There are no children. Plaintiff, by

advice of counsel, refused to finish her cross-examination and left the examiner's room, so that it is not signed or concluded.

Defendant has no assets in Ontario except personal effects and a contingent interest in certain shares in "some exploration company whose operations are in Trinidad."

Having all these facts in view, and the parties being, as it would seem, both citizens of the United States, I think the motion should be dismissed.

I refer to Knapp v. Knapp, 12 P. R. 105; Pherrill v. Pherrill, 6 O. L. R. 642, 2 O. W. R. 1096; Wheeler v. Wheeler, 17 P. R. 45; Sirdar Gurdial Singh v. Rajah of Faridkote, [1894] A. C. 670.

Plaintiff seems able to go to trial on 28th instant, if she really wishes to proceed with the action.

ANGLIN, J.

NOVEMBER 18TH, 1904.

WEEKLY COURT.

RE LAMB AND CITY OF OTTAWA.

Municipal Corporations—By-law—Lease of Municipal Property—Bonus—Manufacturing Industry—Necessity for Submission of By-law to Ratepayers—Closing up of Public Place—Exemption from Municipal Taxation—Taxation for School Purposes—Application to Quash—Time—Promulgation of By-law—Discretion.

Motion by one Lamb to quash by-law 2351 of the city corporation, passed 21st March, 1904, authorizing a lease to Owain Martin and others of premises formerly used as a public market and known as "The Western Meat, Fish, and Produce Market."

Glyn Osler, Ottawa, for applicant, contended that the by-law in substance granted a bonus in aid of a manufacturing industry, and the assent of the ratepayers requisite under sec. 591, sub-sec. 12 (a), of the Municipal Act, 1903, had not been obtained; and (2) that the by-law and the lease thereby ratified purported to grant an exemption from taxation for school purposes.

Taylor McVeity, Ottawa, for city corporation.

ANGLIN, J.—In support of the contention that by-law 2351 is "a bonus by-law," counsel for plaintiff argued: (a) That, although the application of the lessees was for the market building only, and the report of the finance committee, adopted by council, recommended a lease merely of the build-

ing, the lease ratified by the by-law includes lands not covered by the market building, and theretofore used as an open public place. As to these lands it is contended that they are "leased freely" for a purpose connected with a manufacturing industry, and therefore amount to a bonus under sec. 591a, clause (c), of the Municipal Act, 1903. (b) That, as it involves the closing up of a public place, the by-law grants "aid by way of bonus" under clause (d) of sec. 591a. (c) That, inasmuch as it grants an exemption from municipal taxation for a term of years, it is a "bonus by-law" under clause (g) of sec. 591a.

Upon the argument I expressed the opinion as to ground (a) that the applicant's case failed because the lands included in the lease as authorized by the by-law had formed part of the market premises, and might well be regarded as intended to be included as part and parcel thereof in an application and arrangement for a lease of the market building. They cannot be regarded as "leased freely," but may fairly be deemed part of the premises for which the \$500 rental is to be paid.

In view of the opinion I have formed as to other points taken, I find it unnecessary to deal with (b),

(c) I find it impossible to escape the conclusion that this by-law and the lease it ratifies involve an exemption from municipal taxation. Mr. McVeity ingeniously contended that, if the lessees had been required to pay taxes, their rental would have been reduced by the estimated amount of such taxes, and that, therefore, their rental must be deemed to include the taxes which the municipality would otherwise receive from the lessees. The door would be thrown wide open to evasions of the statute, were effect given to this specious argument. The difference is not one of form or name merely; it is, I think, of substance. Money payable as rent may be dealt with in a manner entirely different from money received for taxes. I consider this by-law to be within sec. 591a, clause (g), and, therefore, under sec. 591, sub-sec. 12 (a), I must hold that it required the assent of the electors. This assent not having been obtained, the invalidity of the by-law is established.

Canadian Pacific R. W. Co. v. City of Winnipeg, 30 S. C. R. 558, supports the contention that the exemption from taxation here granted includes exemption from taxation for school purposes—something clearly *ultra vires*: sec. 591a, clause (g). The by-law is upon this ground illegal.

If this were its sole defect, the by-law might perhaps be quashed as to this provision only, under sec. 378, which en-

ables the Court to quash in whole or in part. But, in view of the general exemption already dealt with, whatever discretion the Court may have should not, I think, be so exercised.

Notwithstanding what is said in *Re Grant and City of Toronto*, 12 U. C. R. at p. 358 . . . I doubt whether the applicant is called upon to prove non-promulgation. The statutory limitation is set up by respondents. Should they not put in evidence the facts necessary to support such a plea, one of which is the date of the third publication of the promulgating notice and the by-law? How otherwise can the Court determine whether three months had elapsed between such third publication and the launching of the motion to quash?

But, in the present instance, promulgation, if assumed, could not help respondents. A by-law which the municipal council is only competent to pass after the assent of the electors has been obtained, if passed without such assent would not be validated under the curative provisions of sec. 377—by promulgation: *Canada Atlantic R. W. Co. v. Township of Cambridge*, 15 S. C. R. 219, at p. 226, 14 A. R. 299.

Although in *Re McKinnon and Village of Caladonia*, 33 U. C. R. 502, a large expenditure made by a railway company in reliance upon an impeached by-law seems to have been deemed a matter which the Court might consider in determining whether it should exercise its discretionary power to quash, a similar change of their position by persons interested in maintaining the by-law was not deemed of paramount importance in *Re Village of Markham and Town of Aurora*, 3 O. L. R. 609. It is true that in the latter case application to quash was made within three months after registration. . . . The Legislature has expressly enacted that "in the case of a by-law requiring the assent of electors or ratepayers . . . an application to quash the by-law may be made at any time:" sec. 379 of the *Municipal Act*, 1903. It has thus emphasized the supreme importance of this limitation upon the powers of municipal councils. . .

Assuming that the applicant is seeking by the present motion to subserve his private purposes rather than to promote the general interests of the municipality, I should not on that account decline to interfere, and thus in effect uphold, as a valid by-law, a document which appears to be "utterly void and in fact no by-law:" per Gwynne, J., in *Canada Atlantic R. W. Co. v. Township of Cambridge*, 15 S. C. R. at p. 226.

Order made quashing by-law with costs.

STREET, J.

NOVEMBER 18TH, 1904.

TRIAL.

CITY OF HAMILTON v. HAMILTON STREET R. W.
CO.*Street Railways—Contract with Municipal Corporation—Sale
of Workmen's Limited Tickets—School Children's Tickets
—Right of School Children to Use Limited Tickets.*Motion by defendants to vary minutes of judgment, ante
311.

E. D. Armour, K.C., for defendants.

W. R. Riddell, K.C., for plaintiffs.

STREET, J.—A question was raised as to whether the declaration that defendants are bound to receive the limited tickets called workmen's tickets from all persons during the prescribed hours should be qualified by excepting the case of children between 5 and 14 years of age when going to school. The agreement between the parties was modified on 13th September, 1898, in accordance with by-law 955, by requiring defendants, in addition to the other limited tickets, to "give to any child between 5 and 14 years of age, when going to school, a ticket to go and return on the date of issue, for 5 cents." There is nothing in this amendment to prevent children, when going to school, from paying their fares by using workmen's tickets, provided they use them within the prescribed hours, as they might have done before the amendment to the agreement, if they preferred to do so. The amendment does not make it compulsory upon the children to buy return tickets for 5 cents, when going to school, although it makes it compulsory on defendants to sell such tickets to them if demanded.

Costs of speaking to minutes to be added to plaintiffs' costs of action.

NOVEMBER 18TH, 1904.

DIVISIONAL COURT.

REX v. PIERCE.

*Constitutional Law—Powers of Provincial Legislature—Loan
Corporations Act, R. S. O. 1897 ch. 205—Intra Vires—
Penalty — Prohibition — Criminal Law — Conviction—
Application of sec. 117, sub-sec. 2—Contracts.*

Appeal by defendants, under sub-sec. 4 of sec. 117 of the
Loan Corporations Act, R. S. O. 1897 ch. 205, from their

conviction by the police magistrate for the city of Toronto of the offence of having, acting as agents for the Preferred Mercantile Company of Boston (incorporated), entered into a contract contrary to the provisions of sec. 117.

E. F. B. Johnston, K.C., and J. M. Godfrey, for appellants.

J. W. Curry, K.C., for the private prosecutors.

J. R. Cartwright, K.C., for the Attorney-General.

The judgment of the Court (MEREDITH, C.J., MACLAREN, J.A., MACMAHON, J.), was delivered by

MEREDITH, C.J.—. . . Two points only were taken against the conviction. . . : (1) that clause (b) of sub-sec. 2 of sec. 117, as amended, is not of general application, but applies only to such contracts as are mentioned in clause 5 of sec. 2 of ch. 205; (2) that, if of general application, clause (b) deals with criminal law, and is, therefore, ultra vires of the Provincial Legislature.

I am of opinion that neither of these objections is well taken.

The language of clause (b), standing by itself, is plain, and the contract which defendants entered into, if the clause is to be read literally, was entered into in contravention of its provisions. . . . It was argued that, having regard to the fact that it forms part of a statute dealing with loan corporations, and reading it in connection with and in the light of the other provisions of the statute, the expressions "contract, agreement, undertaking, or promise," must be taken to mean such a contract, agreement, undertaking, or promise as is mentioned in clause 5 of sec. 2.

I see no reason for so limiting the operation of the clause. . . .

[Reference to R. S. O. ch. 205, sec. 117; sec. 2, clause 5; the amending Acts 63 Vict. ch. 27, sec. 12, and 4 Edw. VII. ch. 17, sec. 4.]

Clause (b), but for the exception from the operation of it of corporations registered under the Act or under the Ontario Insurance Act, would have applied to these corporations, and there is nothing in the nature of the exception which makes it necessary to confine the application of the clause to such of the contracts with which it deals as a registered loan corporation or a corporation registered under the Ontario Insurance Act may lawfully enter into. Some at all events of the contracts with which clause (b) deals these corporations may lawfully enter into, and the Legislature may well

have intended absolutely to prohibit the entering into of such contracts by any one except a corporation registered under the Act or under the Ontario Insurance Act, leaving the last named corporations free to enter into such of them as they were respectively empowered to enter into by the Acts relating to such corporations. . . .

The exception in favour of companies registered under the Ontario Insurance Act shews, I think, that it was not intended to deal merely with such contracts as come within the provisions of clause 2 of sec. 5 of ch. 205, and the provisions of clause (c) make it quite clear that the Legislature had in view changes in the general law, and not merely provisions affecting the business of loan corporations. . . .

The form which the prohibition takes is not well chosen. The undertaking or effecting, or offering to undertake or effect, any of the contracts mentioned in clause (b) by any person, partnership, society, association, company, or corporation, not being a corporation registered under the Act or under the Ontario Insurance Act, is made an offence against sub-sec. 1 of sec. 117, and any person acting in behalf of such person, partnership, society, association, company, or corporation, is declared to be guilty of an offence against sub-sec. 2 of the same section.

Sub-section 1 of sec. 117 prohibits the undertaking of the business of a loan corporation as described in clause 5 of sec. 2, and contains a declaration as to what shall be deemed "undertaking the business of a loan corporation" within the meaning of the section, and sub-sec. 2 provides that, if any promoter, organizer, office-bearer, manager, director, officer, collector, agent, employee, or person whatsoever, undertakes or transacts the business of a loan corporation which does not "stand registered under the Act," he shall be guilty of an offence.

While the form of this legislation lends colour to the argument of the appellants' counsel that what is struck at is the making of such of the contracts mentioned in clause (b) as form part of the business of a loan corporation as described in clause 5 of sec. 2, it is not enough to warrant us in cutting down what is, I think, the otherwise plain and unambiguous language of clause (b), and I prefer to adopt the view that what the Legislature has said in this respect is but a clumsy way of saying that the penalty for doing any of the acts mentioned in clause (b) shall be the same as that provided by the sections to which reference is made.

There remains to be considered the question as to the constitutionality of the enactment.

It was contended by counsel for the appellants that the legislation is in form as well as in substance criminal law, but it was conceded that if the effect of clause (b) is to prohibit the making of such contracts as it deals with, under the penalty which it imposes, the enactment is *intra vires* the Provincial Legislature.

That such is the effect of the enactment is not, I think, open to doubt.

It was said by Lord Hatherley in *In re Cork and Youghal R. W. Co.*, L. R. 4 Ch. 745, at p. 758, that "everything in respect of which a penalty is imposed by statute must be taken to be a thing forbidden and absolutely void to all intents and purposes whatsoever;" and that he states to be the view taken by the learned Judges in *Chambers v. Manchester and Milford R. W. Co.*, 5 B. & S. 568. That a penalty implies a prohibition is stated in *Pangborn v. Westlake*, 36 Iowa 546, 549, to be the general rule, and that was also the view taken by the Supreme Court of the United States in *Miller v. Amenon*, 145 U. S. 421-426.

If it be necessary to the validity of the enactment that it be construed as prohibiting that for the doing of which a penalty is imposed, that construction, upon well understood principles, should be given to it, if the language used at all warrants that being done.

Appeal dismissed with costs.

BRITTON, J.

NOVEMBER 19TH, 1904.

CHAMBERS.

RE CLARK.

*Will—Construction—Request to Children at a Certain Place—
Gift to Class—Deceased Child—Right of Issue to Represent—
Absentee.*

Motion by executors of will of Thomas Clark for an order under Rule 938 determining the question whether the children of William Clark, a deceased child of the late Thomas Clark, were entitled to share under the will.

W. Bell, Hamilton, for executors and all persons interested except the children of William Clark.

F. W. Harcourt, for the children of William Clark.

BRITTON, J.—The deceased once resided in England. By his first wife he had four children. His first wife died, and

then deceased came to Canada and settled in Hamilton. His four children remained in Barnstable, England. Deceased married again, and by his second wife had one child. Deceased made his will on 15th May, 1891, and died on 8th April, 1900.

By his will, after providing for his widow and her child, he devised two dwelling-houses in Hamilton to his "children at Barnstable, England, to be divided among them in equal shares."

The four children living at the time the will was made were: Samuel, John, William, and Sarah. William died after the making of the will, and before the death of the testator, leaving ten children.

The question is, do these grandchildren take the share which their parent William would have been entitled to had he been alive at the time of the death of the testator?

It was conceded on the argument that these grandchildren would not take under the word "children" in the will, but it was contended that under sec. 36 of the Act respecting wills in Ontario, they would be entitled. . . .

[*Re Williams*, 5 O. L. R. 345, 2 O. W. R. 47, referred to and applied.]

The gift in this case is to a class, and the rule is "that those members of the class who are at the death of the testator capable of taking, take the whole, the gift being construed as shewing an intention on the part of the testator that the class shall take as far as the law allows." In *re Coleman and Jarrow*, 4 Ch. D. 165.

The rule is clearly laid down that sec. 33 of the Wills Act, 1837, does not apply to gifts to children or grandchildren of the testator as a class, and this rule is not affected by the fact "that in the events which happened the class consisted of but one individual." In *re Harvey*, [1893] 1 Ch. 567.

Following these cases, the division must be among the children of deceased who were living at the time of his death, and who were then residing or had resided at Barnstable, so as to come within the class. Sarah disappeared from Barnstable some years ago, and . . . cannot be found. There is no evidence of her death, and for the purposes of the present application she must be considered as alive and entitled to share with her brothers Samuel and John.

Costs of all parties out of estate.

MACLAREN, J.A.

NOVEMBER 19TH, 1904.

C.A.—CHAMBERS.

HAMILTON v. MUTUAL RESERVE LIFE INS. CO.

Appeal to Supreme Court of Canada—Application for Leave to Appeal after Time Expired—Dismissal by Judge of Court of Appeal—Leave to Appeal to full Court.

Motion by defendants (1) for leave to appeal to the full Court of Appeal from order of MACLAREN, J.A., ante 299. dismissing application of defendants, under sec. 42 of the Supreme and Exchequer Courts Act, to allow an appeal to the Supreme Court of Canada after the time for appealing had expired; or (2) to refer the matter to the full Court; or (3) to rehear the motion.

The order dismissing the former application had been settled and issued.

Shirley Denison, for defendants.

D. L. McCarthy, for plaintiff, opposed the application on the ground that the Judge was functus officio.

MACLAREN, J.A.—I have not been referred to any authority precisely in point; nor have I found any provision of the law which would give me jurisdiction to make such an order as is here asked for.

The application is, therefore, dismissed with costs.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING NOVEMBER 26TH, 1904.)

VOL. IV. TORONTO, DECEMBER 1, 1904. No. 14

BRITTON, J.

NOVEMBER 19TH, 1904.

CHAMBERS.

BLACKLEY CO. v. ELITE COSTUME CO.

Writ of Summons—Service out of Jurisdiction—Place where Contract Broken—Sale of Goods—Place of Payment.

Appeal by defendants from order of McAndrew, official referee, sitting for the Master in Chambers, dismissing a motion by defendants to set aside an ex parte order for service of the writ of summons upon defendants out of the jurisdiction, and the writ and service, etc.

Joseph Montgomery, for defendants.

R. W. Eyre, for plaintiffs.

BRITTON, J.—The action is . . . for the price of goods or for damages for non-acceptance of goods ordered by defendants at Montreal.

On 8th March, 1904, defendants wrote upon their own blank form an order on plaintiffs for certain goods. This order, when filled out, was given to an agent or traveller of plaintiffs to be by him delivered to defendants at Toronto. The order states the terms of payment . . . 5 per cent. off for cash if paid within 30 days, or a credit of 4 months from 1st June, and the goods were to be delivered to defendants f.o.b. at Toronto.

Plaintiffs have their head office and chief place of business at Toronto. Defendants knew this, and I think it is a fair inference from the evidence as to this transaction that defendants knew that the order as prepared by them was to be sent to Toronto, and that it was optional with plaintiffs whether they accepted the order in the terms of it or not. Plaintiffs did accept the order. Accepting the order in Toronto, for goods to be delivered in Toronto, made this, as I think, an Ontario contract, and, if so, payment should be made to plaintiffs in Ontario.

There is an entire absence of any agreement, express or implied, that payment should be elsewhere than in Toronto.

No doubt, plaintiffs asked Edelman to draw for amount of this invoice, but defendants did not accept. Defendants stood and now stand by their original agreement, whatever that was; so plaintiffs have not lost any original rights by merely attempting to get a settlement, by the attempted intervention of the persons in Germany who sold the goods to plaintiffs.

Plaintiffs have made out a case for the jurisdiction of the Court in Ontario. They say the contract was to be performed in Ontario, and that there are breaches of that contract in Ontario. . . . So far as now appears, in whatever way plaintiffs seek to recover, they do so by reason of an alleged breach in Ontario of a contract to be performed in Ontario. . . .

[Phillips v. Malone, 3 O. L. R. 492, 1 O. W. R. 200, and Dewie v. Gans, [1904] 2 K. B. 685, referred to.]

Appeal dismissed with costs to plaintiffs in any event.

CARTWRIGHT, MASTER.

NOVEMBER 21ST, 1904.

CHAMBERS.

F. T. JAMES CO. v. DOMINION EXPRESS CO.

Discovery—Production of Documents — Privilege — Contemplated Litigation—Affidavit on Production.

Action to recover damages for breach of contract by defendants and resulting injury to fish contained in two cars which were to be sent by express from Selkirk to Toronto, as set out in statement of claim.

At the time when these two carloads were shipped to plaintiffs, two other carloads of fish were shipped to the Wolverine Fish Co., who also sued defendants.

Certain letters had passed between plaintiffs and the Wolverine Fish Co., but these plaintiffs decline to produce, on the ground of privilege, which was set out in the 10th paragraph of plaintiffs' affidavit on production, as follows:

"The letters and documents above referred to marked 'A,' 'B' and 'C' in respect of which privilege is claimed, were all dated on or after the day upon which the fish in question in this action ought to have arrived in Toronto, and relate to the arrival of the two carloads of fish shipped to the Wolverine Fish Co., Limited, as well as to the arrival of the

fish in question in this action and the condition thereof, and were written with a view to obtaining information upon which to base their claim against defendant company and to lay before the solicitors of plaintiffs and the Wolverine Fish Co., Limited, to obtain advice as to the prosecution of this action. Said letters also contain information and advice from the Wolverine Fish Co., Limited, as to the treatment of said fish."

Before this affidavit was filed a motion was launched for a better affidavit, one having been already filed on 26th September.

Shirley Denison, for defendants, contended that the correspondence referred to in the 10th paragraph of the new affidavit on production was not privileged and should be produced.

G. H. D. Lee, for plaintiffs.

THE MASTER.—"The cases mainly relied on were *Wheeler v. LeMarchant*, 17 Ch. D. 675, and *Collins v. London General Omnibus Co.*, 5 R. 355. I think the motion must fail. In the first case *Jessel, M.R.*, says (p. 681), of similar documents, that they "no doubt are protected where they have come into existence after litigation commenced or in contemplation; and when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation."

In the other case *Wills, J.* (at p. 356) says: "I do not think it makes any difference whether at the time this document came into existence an action had been formally threatened or not. If the circumstances were such that no reasonable person could doubt that an action would follow, they might lay the foundation of privilege for a document such as this." And the case of *Southwark Water Co. v. Quick*, 3 O. B. D. 315, is cited as authority for this proposition. See *Bray's Digest of the Law of Discovery* (1904) at p. 14 (secs. 53, 54) and pp. 32 to 36, where all the important cases are collected and discussed.

The motion will therefore be dismissed. But, as plaintiffs admit that a further affidavit was necessary, the costs may be in the cause.

BRITTON, J.

NOVEMBER 21ST, 1904.

CHAMBERS.

RE HALL.

Will—Legacy—Uncertainty as to Legatee Intended—Legacy Paid into Court—Motion for Payment out—Decision on Affidavits instead of Issue Directed—Costs.

Motion by Maria Baxter for payment out of Court to her of a sum of money paid in by the executors of Martha Hall, deceased, being the amount of a legacy claimed by the applicant and also by one Margaret Baxter.

M. R. Gooderham, for Maria Baxter.

R. U. McPherson, for Margaret Baxter.

BRITTON, J.—Both claimants are nieces of Martha Hall, late of the city of Stratford, in this Province. . . .

One clause in the will is as follows: "I give, devise, and bequeath unto my niece Maria Baxter, of Cronyn Cross, county of Farmanagh, Ireland, the sum of \$500." . . .

It is not, as a rule, satisfactory to decide between rival claims, upon affidavit evidence, but the circumstances in this case, I think, warrant my disposing of the matter. No useful purpose will be served by my directing an issue between the claimants.

Maria Baxter practically in every respect answers the description of the legatee named in the will.

It, no doubt, is a strong point in favour of Margaret that she was during the lifetime of the liberal testatrix the recipient of gifts from her.

Maria corresponded with her aunt, but she does not say that any money or gift of any kind was received by her from her aunt. The aunt knew Maria, knew where Maria resided. Both claimants are related to the aunt in the same degree. The will explicitly names Maria, and not Margaret. It describes Maria as of "Cronyn Cross." There is no such place, but there is Cooneen Cross, the proper description of Maria's residence when the will was made, and not the place of residence of Margaret at that time. Margaret left Cooneen Cross in 1891.

It is just possible that by the payment out to Maria the money will go to the person not intended by the testatrix, but, if so, it will be by an accident that cannot be prevented. The letter produced by Margaret is dated 9th February, 1887. Many things may have occurred to call Maria to the remembrance of her aunt between that date and 9th December, 1901, the date of the will.

It is not suggested that any new material facts could be brought out on the trial of an issue. . . . There is no doubt that the testatrix was corresponding with Margaret. Maria says she also received letters from her aunt.

An order must go for payment out to Maria, but it is a case in which, I think, costs of both parties should be paid out of the fund, and I fix the costs of Margaret Baxter at \$25.

BRITTON, J.

NOVEMBER 21ST, 1904.

CHAMBERS.

RE MAYBEE.

Will—Devise to Stranger and Heirs—Remainder over in Default of Heirs—Devise Voided by Devisee Witnessing Will—Acceleration of Remainder.

Application under Rule 938 by the executor of the will of Angeline E. Maybee, deceased, for the opinion and direction of the Court as to the person or persons entitled to the estate under the will.

J. W. Gordon, Brighton, for executor.

A. R. Clute, for John Heber Fogarty.

BRITTON, J.—The will is dated 16th November, 1899, and the testatrix died on 7th February last, leaving a farm of 100 acres in the township of Murray, but no personal estate so far as appears.

The clause in the will occasioning the difficulty is the following: "I hereby bequeath to my adopted daughter Elizabeth Leavis the whole of my real and personal estate for her sole and only use absolutely, and in the event of her decease, without heirs, I further direct that whatever may remain of my real and personal estate shall go to my nephew John Heber Fogarty for his sole use and disposal."

Elizabeth Leavis, unfortunately, was one of the witnesses to the will, and so the gift to her is void under sec. 17 of the Wills Act of Ontario.

Under the authority of *Aplin v. Stone* [1904] 1 Ch. 543, the will must be construed before sec. 17 is applied.

The decease of Elizabeth Leavis does not, in this case, mean her death before the death of testatrix. The will contemplates the entry by Leavis into possession of the property and such user of it as she pleases during her life. "Without heirs" in this case means "without children lawfully begotten" or "without heirs of the body. There is no gift to children or "heirs" if there should be such born to Leavis, but in that case, had the gift to Leavis been good, then the

remainder to John Heber Fogarty would be defective, because it was the expectation and wish of the testatrix that these children should inherit. See *Re McDonald*, 6 O. L. R. 428.

It was clearly the intention of the testatrix, if there were no such children, that John Heber Fogarty should have the property, or so much of it as would remain after the death of Leavis. The question now is, whether the taking away the estate of the adopted daughter by the operation of the Wills Act causes an intestacy or "accelerates the remainder."

I am of opinion that the latter results. The condition under which Fogarty would be deprived of any of the property remaining at the death of Leavis could not exist. The children, if any, not taking under the will, could not possibly take at all. As their mother is not the owner, she takes nothing. To use the language so far as applicable and to apply the reasoning of *Malins, V.-C.*, in *Jull v. Jacobs*, 3 Ch. D. at p. 703, Fogarty was postponed to Leavis because she was to have the property, and postponed to the children of Leavis if she should die leaving children who would inherit it. But the mother cannot have the property, her children cannot inherit the property, nor can they take under the will. If the mother had known that from any cause neither Leavis nor her children could take, it is quite evident she would not have postponed the gift to Fogarty. It is, of course, by mere accident or ignorance of law that Leavis cannot take, but she must be regarded as dead and with no children, that is, none who can inherit this property, and with all the property remaining on hand.

I think Fogarty is entitled to the property, subject to the payment of debts and costs and expenses. . . .

Declaration that there is an acceleration of the estate to John Heber Fogarty. . . .

It appears from the affidavit of the executor that Elizabeth Leavis is now the wife of John Heber Fogarty. . . .

Costs of all parties out of estate.

BRITTON, J.

NOVEMBER 22ND, 1904.

CHAMBERS.

RE TIDEY.

*Life Insurance—Benefit Society—Beneficiaries—Executors—
Payment into Court.*

Petition by the Order of Canadian Home Circles, a benefit society, for leave to pay into Court \$1,900 in respect of a beneficiary certificate upon the life of John A. Tidey.

W. A. Dowler, K.C., for petitioners.

W. H. Blake, K.C., for Mary E. Bannon, a daughter of the insured.

BRITTON, J.—The certificate is dated 31st January, 1896, and the money is made payable to Marv E. Tidey or her assigns. This was, by indorsement on 5th April, 1904, revoked, and a direction given to pay to the executors of Mary E. Tidey. On 27th June, 1904, John A. Tidey made his will, giving the money secured by this certificate to his daughter Mary E. Bannon for her own use, but subject to the direction that she should invest the money with his executors, and giving them the right to pay out money for her maintenance and also for the maintenance of her mother. John A. Tidey died on 28th June, 1904.

One Peter Wood sets up some claim to this certificate by virtue of an alleged assignment from Mary A. Tidey.

Mr. Blake opposed the payment into Court, as the only persons who now can be interested in this fund are prepared, upon its being paid over to the daughter, to give a release.

I think the petitioners are entitled to relieve themselves of all responsibility in regard to this money by paying it into Court, and the usual order must go.

If the claimants Mary E. Bannon and Peter Wood and the executors of John A. Tidey agree as to the payment out of this money, there should be no difficulty and comparatively little expense in disposing of the matter satisfactorily.

BRITTON, J.

NOVEMBER 22ND, 1904.

CHAMBERS.

RE MILLER.

Life Insurance—Benefit Society—Beneficiaries—Alteration in Certificate—Payment into Court—Issue—Parties—Who to be Plaintiffs.

Petition by the Order of Canadian Home Circles, a benefit society, for leave to pay into Court \$1,000, being part of the amount secured by a beneficiary certificate upon the life of John Wesley Miller.

W. A. Dowler, K.C., for petitioners.

J. H. Spence, for Christiana W. Miller.

W. H. Blake, K.C., for William F. Miller.

BRITTON, J.—On 24th June, 1891, a certificate issued for \$2,000 payable to Christiana W. Miller, wife of insured. On 27th April, 1894, John W. Miller applied to increase the

amount of his insurance to \$3,000, making the additional \$1,000 payable to his brother William F. Miller; and on 18th June, 1894, a new certificate was issued for \$3,000, payable \$2,000 to Christiana W. Miller, wife, and \$1,000 to William F. Miller, brother. On 4th August, 1899, the insured applied to reduce the insurance, and he made the indorsement on the certificate that payment was to be made to his wife \$1,000, to his brother \$1,000, and that he cancelled the remaining \$1,000. On 11th October, 1899, a new certificate issued in favour of John W. Miller, called "reduced certificate," for \$2,000, and this amount was made, in the body of the certificate, payable to Christiana W. Miller, wife, \$1,000, and to William F. Miller, brother, \$1,000.

John Wesley Miller died on 10th July, 1904, not having made any will or changed in any way the certificate of 11th October, 1899.

Mrs. Miller claims under this certificate, and she claims the whole amount, as she says the \$1,000 reduced on 4th August, 1899, and as appears in the last certificate, was an unauthorized and unlawful diversion of that \$1,000 from her to the brother.

In the proofs of claim put in, the last certificate is referred to, and that is the one on which this claim is based.

In view of sec. 159 of the Ontario Insurance Act, and of possible difficulties in the interpretation of that Act, I think the petitioners are entitled to the usual order for payment in of the \$1,000, less the costs of this application.

Apparently there are few, if any, facts in dispute, but the question as to the ownership of this money is mainly one of law.

If Christiana W. Miller desires an issue to determine the question as to who is entitled to the money, I will direct such issue, in which she will be plaintiff, and William F. Miller will be defendant. I so order because upon the face of the new beneficiary certificate the \$1,000 is payable to him, and so far as appears this sum is merely the continuation of a new insurance for his benefit. . . . Prima facie it was not a diversion of any insurance effected in favour of the wife.

If Christiana W. Miller does not accept the issue within ten days, the claimant William F. Miller may make an application, upon notice to her, for payment out to him of the money paid in by petitioners.

BRITTON, J.

NOVEMBER 22ND, 1904.

CHAMBERS.

RE PARISH.

Life Insurance—Benefit Society — Beneficiary — Conditions Imposed by Will—Notice to Society—Payment into Court—Reduced Amount—Ascertainment.

Petition by the Order of Canadian Home Circles, a benefit society, for leave to pay into Court \$789.39 in respect of a benefit certificate upon the life of George Parish, instead of \$1,000, for which amount the certificate was issued.

W. A. Dowler, K.C., for petitioners.

H. E. Rose, for Edith Parish, claimant.

BRITTON, J.—The certificate issued on 7th September, 1901, and is on its face payable to Edith Parish, daughter of George Parish; there was no change by any indorsement. On 18th October, 1901, George Parish made his will giving this certificate to his daughter Edith, but . . . attached, or attempted to attach, conditions to the use and investment of the money. Parish died on 12th January, 1904. It does not appear that the executors have obtained probate of the will, and they have not made any formal claim to the money secured by the certificate, but the solicitor for one of the executors has given to the petitioners a copy of the will, and has notified them of the facts which may have induced the testator to make such a will. That having been done, if the petitioners should pay the money to Edith, they would do so at their own risk. Sub-section 7 of sec. 151 of the Ontario Insurance Act, R. S. O. 1897 ch. 203, prevents insurers, except at their own risk, from dealing with and obtaining a valid discharge from a beneficiary after a copy of the will affecting the insurance money or any portion of it has been received.

In these circumstances, the petitioners are entitled to the usual order for leave to pay the money into Court.

It is not admitted that upon the facts set out in the petition \$789.39 is the proper amount, even if conceded that there was a difference of age as alleged. The true amount can easily be ascertained under sec. 149 of the Insurance Act, and if it is really in dispute the Clerk in Chambers may determine it, or I will do so upon hearing the parties, so that the correct amount may be inserted in the order.

This is a case in which there are no disputed facts, so the claimant should have leave, on notice to the executors, to apply for payment to her of the said money or a part thereof,

or for such disposition of the money as to the Court may seem meet.

Usual costs of an application to pay in to be deducted from proper amount payable on the certificate, and balance to be paid into Court.

NOVEMBER 23RD, 1904.

DIVISIONAL COURT.

WALKER v. BOWER.

Money Paid—Advance to Protect Stocks—Express or Implied Contract to Repay—Ratification.

Appeal by plaintiff from judgment of MORGAN, Jun. Co.J., dismissing action in County Court of York brought to recover \$220 alleged to have been paid by plaintiff to one Smith for the use and benefit of defendant.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., IDINGTON, J.

W. N. Ferguson, for appellant.

R. C. Clute, K.C., for defendant.

IDINGTON, J.—Plaintiff and defendant had been friends, but had become so much estranged that, at the time when plaintiff gave his cheque for \$220 to one J. C. Smith, a broker, to prevent a re-sale of stock then being carried by the broker for defendant, they were not on speaking terms.

A good deal of doubt . . . has been raised by defendant as to the intention of plaintiff in making the advance, and indeed as to the good faith of both plaintiff and Smith in regard to their dealing in the matter.

I think all that must be set aside when it is found as a fact, as in effect it is, by the trial Judge, and not disputed, that at the time plaintiff gave his \$220 cheque to Smith the stocks in question had fallen that much, and were worth and could have been bought in the open market for just that much less than they cost plaintiff by beginning the deal, as he swears, to save an old friend.

I find no other motive than the one assigned by plaintiff for his conduct. I think it was both credible and creditable.

Defendant clearly recognized Smith's right to advance for defendant's benefit, to carry his stock, the amount in question, and look to him for repayment. He treats himself, as clearly as can be, as indebted to Smith on 1st April. He admits in his evidence that when Smith told him of Walker's payment, he said he would see Walker—not a word breathed

then of repudiation. He saw Walker—indeed he forthwith started in search of him and found him—and in the witness box speaks thus: “Q. Why did you go to see Walker? A. Because I told Mr. Smith I would, and wanted to tell him what I thought about it. Q. And what you did think about it was that you would see Miss Clapp and try and get the money for him? A. When he looked at me he looked so candidly that I thought he was acting honestly.”

I think the correct inference to draw from all this writing, conduct, and the evidence of defendant, is, that he intended to adopt plaintiff's generous act and repay him.

I therefore see no reason to doubt Mr. Smith's recollection of what defendant told him when he says that “he (Bower) was going to pay him (Walker) back.” If he did say so to Smith, at that moment he became bound by his ratification. Up to that time when Smith accepted this assurance, and Walker immediately afterwards agreed (in the way and upon the doubtful terms defendant says he did) to wait, it was quite competent for Walker to have arranged with Smith to cancel the advance made, and he also could have taken over an assignment from Smith of his rights as against defendant.

The cases of ratification or adoption of payment by a third person, not himself liable as a co-contractor, shew that until ratified the payment cannot be pleaded in defence by the debtor: see *Walter v. James*, L. R. 6 Ex. 124; that it may be ratified at any time if left open: see *Simpson v. Eggington*, 10 Ex. 845; and that “an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law:” see *Wilson v. Turman*, 6 M. & G. at p. 242.

It would have been impossible for plaintiff, after what transpired, to have withdrawn his money, as he might have done up to the interview referred to, or for him or Smith to have claimed in law the profits upon these stocks, if any had accrued within the week or ten days defendant says he asked plaintiff to wait to see some one about getting the money to repay plaintiff.

The assent of all parties to their changing their legal relations on the day defendant saw the others, furnishes quite sufficient consideration to support the promise to repay.

But I think plaintiff's case can well be rested upon defendant's adoption of plaintiff's act, and defendant as a result be held liable for money paid at his request or as for

money lent. See the cases referred to in Story on Agency, 9th ed., secs. 239 to 260; Broom's Legal Maxims, 7th ed., p. 356 et seq.; Lyell v. Kennedy, 14 App. Cas. 437.

Defendant pleads that the transaction in respect of which the advance was made was an illegal one. He seems to have abstained from proving it to be so, if in truth it were an illegal dealing. The law presumes in favour of legality, and the transactions in question here are, on the evidence before us, fully covered by the presumption.

MEREDITH, C.J.—I agree that the judgment appealed from is erroneous and must be reversed.

In my opinion, plaintiff's right to recover may be supported upon the express agreement of defendant, upon which plaintiff relies, to repay the money which plaintiff paid to Smith on 1st April to prevent defendant's stock being sold out: and, independently of the express agreement, on the implied promise to repay plaintiff the money which he had paid as money paid by him for the use of defendant. . . .

Appeal allowed with costs, and judgment to be entered for plaintiff for \$200 with costs.

MACMAHON, J., concurred.

STREET, J.

NOVEMBER 24TH, 1904.

CHAMBERS.

RE McDougall.

Will—Construction—Bequest to Wife—Limited Power of Disposal—Summary Application under Rule 938—Scope of.

Motion by Ellen McDougall, administratrix with the will annexed, for an order declaring construction of the will of her deceased husband, and whether she alone was entitled under the will to the estate of the testator, or whether her children were entitled to share in it.

The will was dated 23rd August, 1903, and the testator died on 21st September, 1903.

The will was as follows: "This is my last will and testament. I bequeath to my wife all that I possess with full power to dispose of part or the whole as she and the children may think wisest and best at any time."

He appointed no executor, and letters of administration with the will annexed were granted to his widow on 29th December, 1903.

He left real estate of the value of \$6,000, and personalty about \$1,150, and six children, five of whom are infants.

The question submitted was whether the children took any estate or interest in the estate under the will.

W. H. Blake, K.C., for the applicant.

F. W. Harcourt, for the five infant children.

No one appeared for the adult child.

STREET, J.—I think it is clear that the widow takes the absolute ownership of the real and personal estate of the testator, and that her children take no interest in it under the will. This is all that could come up in administration proceedings, and it is as far as Rule 938 permits me to go in interpreting the will: *Re Sherlock*, 18 P. R. 6; *Re Whitty*, 30 O. R. 300.

The administratrix has the ordinary power, without regard to the will, of selling so much of the estate as may be necessary for payment of debts. The question as to whether, having paid the debts, she could sell the rest of the property without the consent of the children, is one which will arise if she desires to sell it under those circumstances: but I have no authority to determine it under Rule 938.

The costs of the application should be paid out of the estate.

STREET, J.

NOVEMBER 24TH. 1904.

CHAMBERS.

RE MARTIN.

*Will—Construction—Devise — Restraint upon Alienation —
Summary Application under Rule 938—Scope of.*

Application by devisees under Rule 938 for a construction of certain clauses of the will of Moses Martin, deceased.

J. M. Ferguson, for the devisees, the applicants.

J. E. Day, for the executors.

J. A. Walker, K.C., for the Chatham Loan Co.

STREET, J.—The testator devised to each of his five sons fifty acres of land in Dover East, subject to the payment of certain charges to other members of the family. At the conclusion of these devises he declared in his will as follows: "None of my sons will have the privilege of mortgaging or selling their lot or farm aforesaid described, but if one or more of these lots have to be sold on account of mismanagement the executors will see that same will remain in the Martin's estate."

The five sons are desirous of mortgaging their shares for the purpose of raising money to pay off the charges which have matured and certain debts of the testator which are charged upon the land, and the object of the present application, which is made by them, is to obtain the opinion of the Court as to whether the restraint upon alienation which the testator has attempted to create is valid.

I cannot find that Rule 938 gives me any authority to determine this question. The question propounded is one with which the executors have nothing to do, and it does not in any way relate to the administration of the estate. The rights or interests of the devisees inter se or as between them and the executors, or as between them and their brother and sisters, are not in question at all: *Re Sherlock*, 18 P. R. 6; *Re Whitty*, 30 O. R. 300.

The only question is whether these five devisees who make the application, and who undoubtedly take under the will a fee simple in the lands devised to them, are restrained from afterwards dealing with their lands in the usual manner.

The question is a highly important one, and has been the subject of great differences of judicial opinion, and I must not assume to deal with it without jurisdiction to determine it.

The motion must be dismissed, but, as objection was not taken to my power to deal with the question, there will be no costs.

NOVEMBER 25TH. 1904.

DIVISIONAL COURT.

BELL v. LOTT.

Trespass—Searching Private Dwelling House without Warrant—Liquor License Act—House of Public Entertainment—Honest Belief—Leave and License—Questions for Jury—Pleading.

Appeal by plaintiff from judgment of senior Judge of County Court of Hastings, withdrawing the case from the jury and dismissing the action at the conclusion of the trial.

The action was brought to recover damages for an alleged trespass to land and searching the dwelling-house of plaintiff.

E. G. Porter, Belleville, for plaintiff.

J. H. Moss, for defendant.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

MACMAHON, J.—Defendant was on 12th April, 1904, appointed a constable for the county of Hastings for the period of 30 days, by the police magistrate for the city of Belleville, before whom he on the same day took the oath of office, which was filed with the clerk of the peace for the county of Hastings, and a notification of the appointment was also on the same day mailed by the magistrate to the Lieutenant-Governor.

When defendant applied to be appointed a constable he said his object was to prosecute those accused of violations of the Liquor License Act. . . .

On 14th April defendant went to plaintiff's private residence . . . and, according to plaintiff's evidence, stated that Mr. Faulkner, the license inspector, had appointed him to make searches, and he was there to search for persons violating the law, and that he intended searching the cellar under plaintiff's house for liquor which he supposed was stored there for the purpose of sale. He also told plaintiff he was a constable for the county, and any one preventing him making the search was liable to a fine of \$100. Plaintiff procured a lantern which he gave to defendant, but stated that when doing so he told him he had no right to search the premises. Defendant made a thorough search of the cellar, but found no liquor therein; and plaintiff said he never sold liquor or kept any for sale. . . .

[Reference to sec. 130 (1) of the Liquor License Act, R. S. O. 1897 ch. 245; *Rex v. Cretelli*, 3 O. W. R. 176.]

Defendant had known plaintiff for many years, and said he knew it was against the law to search a private house, and had he known it was plaintiff's house, he would not have searched it without a warrant, and that he never had any reason to apply for a warrant. . . .

There was no evidence whatever that the premises occupied by plaintiff was a house of public entertainment, or that liquor had at any time been sold or kept upon the premises.

The trial Judge directed a nonsuit to be entered because defendant was a constable acting in the discharge of his duty in making the search, and, there being no evidence of malice, he came within the protection of R. S. O. 1897 ch. 88, sec. 1 (1), and was entitled to a notice of action, without which plaintiff could not succeed.

The question whether defendant was acting bona fide in the discharge of his duty as a constable in searching a private house, as being a house of public entertainment, for liquor, was a question for the jury; and, in view of defendant's admission that he knew he had no right to search a private house, it is difficult to see how he can have made the search in discharge of his powers as a constable; indeed the real defence is that the search was made by leave of plaintiff. Honest belief is always a question for the jury: *McKay v. Cummings*, 6 O. R. 400.

During the argument counsel for defendant urged that the procuring by plaintiff of a lantern and giving it to defendant when entering the cellar was conclusive of leave having been given by plaintiff to make the search. But plaintiff says he told defendant when handing him the lantern that he had no right to search the cellar, and plaintiff's housekeeper said that while defendant was descending the cellar stairs she heard plaintiff tell him he had no right to search the cellar, and defendant himself admits that, as plaintiff handed him the lantern, he told him he had no right to search the house.

There is no plea of leave and license on the record, and without an amendment that question cannot properly be, as if the amendment had been made it must have been submitted to the jury.

Appeal allowed, nonsuit set aside, and new trial ordered, with liberty to defendant to amend by adding a plea of leave and license.

Costs of the former trial and of the appeal to plaintiff in any event.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING DECEMBER 3RD, 1904.)

VOL. IV. TORONTO, DECEMBER 8, 1904. No. 15

MEREDITH, C.J. NOVEMBER 25TH, 1904.
CHAMBERS.

COLEMAN v. HOOD.

Judgment Debtor—Transfer of Shares in Company—Injunction to Restrain Further Transfer — Examination of Transferee—Aid of Execution—Affidavit.

Appeal by defendant McIndoe from order of Master in Chambers, ante 309, requiring appellant to attend at his own expense for re-examination and to answer certain questions which he refused to answer upon an examination for evidence on a pending motion to continue an interim injunction restraining defendants from dealing with certain shares alleged to be the property of defendant Hood, against whom plaintiff had recovered a judgment for payment of money.

W. J. Boland, for appellant.

W. E. Middleton, for plaintiff.

MEREDITH, C.J., varied the order by substituting for the direction to attend, the appellant's undertaking to consent to the injunction being continued until the trial. Costs in the cause.

NOVEMBER 26TH, 1904.

DIVISIONAL COURT.

HOPEWELL v. KENNEDY.

Libel—Letter to Newspaper—Defence—Provocation by Utterances of Plaintiff Reported in Newspaper—Privilege—Mitigation of Damages—Counterclaim—Malice.

Appeal by defendant from an order of MACTAVISH, Co.J., sitting for a Judge of the High Court at the Ottawa assizes,

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upon motion of plaintiff, striking out paragraphs 5, 6, 7, 8, and 9 of the defence, and also the counterclaim, but giving plaintiff leave to amend.

H. M. Mowat, K.C., for defendant.

No one appeared for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

TEETZEL, J.—The action is for libel. . . . The County Court Judge followed *Murphy v. Halpin*, Ir. R. 8 C. L. 127. . . . Plaintiff was an alderman of the city of Ottawa, and as such was a member of the building committee of the public library, and defendant was the contractor for the stone and mason work of the library building. The libel complained of was in a letter written by defendant to the editor of the Ottawa "Evening Journal," published in that newspaper on 23rd October, 1903, in which, after calling attention to certain statements made by plaintiff at a meeting of the committee criticizing the work upon the library building, defendant proceeds to charge in effect that plaintiff was actuated in his criticism by spite and bigotry; that plaintiff was himself an incompetent mechanic; that certain buildings were put up by plaintiff "of which he ought to be ashamed;" that plaintiff owed defendant an account which he had to force him to pay; that plaintiff was always in a quarrelling mood; and that "if the like of Alderman Hope-well is a fit man to inspect my work, it is time I quit building."

The paragraphs of the defence struck out allege that plaintiff at said meeting, well knowing the public character thereof, and that the proceedings thereat would be duly reported in the public newspapers, made several serious charges in respect of the manner in which defendant was carrying out his contract, alleging that the work had an appearance of "botch work," and that "the hand of a mechanic did not shew in any of it;" that in making the charges plaintiff claimed to be specially qualified to make the same by reason of being himself a public contractor; that the said charges were duly reported in the public newspapers, especially the said "Evening Journal," and became and were matters of great public interest; that if defendant wrote the said letter, it was addressed to the editor of said newspaper and was published to the said editor and in said newspaper by defendant, as he might lawfully do, in reply to the charges so

made by plaintiff and published in said newspaper, and bona fide for the purpose of vindicating his character against plaintiff's attack, and in order to prevent plaintiff's said charges from operating to his prejudice, and in reasonable and necessary self defence and without malice; and that the occasion is therefore privileged. In his counterclaim defendant repeats the above allegations, and says that the charges so made by plaintiff were falsely and maliciously spoken and published of defendant in the way of his trade and as a building contractor.

The point involved in the appeal is whether the above facts as pleaded constitute a privileged occasion, and therefore, in the absence of express malice, a defence to the action. It will be observed that it is not alleged by defendant that plaintiff procured or caused his remarks at the committee meeting to be published in the newspapers, but in paragraph 4 he says that the meeting was open to the public and was attended by the reporters of the leading newspapers in Ottawa, for the purpose of reporting the proceedings at said meeting in their respective papers, and in paragraph 5 charges plaintiff with well knowing that the proceedings thereat would be duly reported in said newspapers.

I take it to be well settled that where a person publishes in a newspaper statements reflecting on the conduct or character of another, the aggrieved party is entitled to have recourse to the same paper for his defence and vindication, and may at the same time retort upon the assailant when such retort is a necessary part of the defence, or fairly arises out of the charges made by the assailant, and in so doing if he reflects upon the conduct and character of the assailant, it is for the jury to say whether he did so honestly and in self defence or was actuated by malice: see *O'Donohue v. Hussey*, Ir. R. 5 C. L. 124; *Dwyer v. Esmonde*, Ir. L. R. 2 Q. B. D. 243; . . . *Odgers*, 3rd ed., p. 253; *Folkard*, 6th ed., p. 278.

Except in *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495, I have found no case in which such a defence has been allowed where the defamation complained of by defendant consisted of oral statements made by plaintiff at a public meeting in the presence of reporters who, without being expressly required to do so, published such statements in their newspapers, but I do not think the *Laughton* case an authority for the defence in this action, by reason of the special and extraordinary conditions involved in it.

I think this case comes squarely within *Murphy v. Halpin*, Ir. R. 8 C. L. 127. . . . I adopt the language of *Dowse, B.*, at p. 138, as singularly applicable to the chief conditions of this case. It was the duty of plaintiff as a member of the building committee to honestly criticize at meetings of the committee the workmanship on a building under its charge, and if such criticisms were not made in good faith and defendant felt aggrieved thereby, he could either resort to an action or communicate to the committee and such other persons as may have heard plaintiff's criticisms his defence thereto, accompanied with such retort upon plaintiff as may have been necessary as a part of his defence or fairly arising out of any charges made by plaintiff, and if in such retort defendant had reflected upon the conduct or character of plaintiff, it would be for a jury to say whether defendant acted in good faith and in self-defence, or was actuated by malice. But, in my opinion, he had no right to publish his defence and retort to the general public through the newspapers. In other words, the public as a whole, unlike the members of the committee and other persons who chanced to hear plaintiff, had no corresponding interest with defendant in the subject matter. . . . While I am clearly of opinion that the facts set forth in the 5 paragraphs in question establish no defence on the ground of privilege, I think many of them would be admissible in mitigation of damages, and limited to that purpose may be pleaded. . . . [Reference to *Stirton v. Gummer*, 31 O. R. 227.]

It is also well established that facts to be given in evidence in mitigation of damages in a libel action must be set out in the statement of defence: *Beaton v. Intelligencer Printing Co.*, 22 A. R. 97.

While I agree with the learned County Court Judge in the substance of the order made by him as to the statement of defence, I think it would have been better to have struck out only that portion of paragraphs 8 and 9 in which defendant claims that "the occasion is therefore privileged," and allow him to substitute therefor the words "and defendant pleads the aforesaid facts in mitigation of damages," but the leave given to amend fully protects defendant.

As to the counterclaim the learned Judge was of the opinion that, as the occasion on which plaintiff is charged with defaming defendant was *prima facie* a privileged occasion, the counterclaim should have shewn in what respect plaintiff exceeded his privilege. With much respect, I think

the reference in the counterclaim to the charges as set forth in the defence, and the further allegation that such charges were falsely and maliciously spoken by plaintiff, are quite sufficient to make the counterclaim in its present form a good pleading within Rule 268.

It is never necessary or even permissible to set out the evidence by which malice is to be established at the trial: see *Glossop v. Spindler*, 29 Sol. J. 556; *Odgers*, 3rd ed., p. 556.

Appeal allowed as regards counterclaim and dismissed as regards defence. If defendant desires to amend his defence, he should do so within 5 days. No costs of appeal or of order appealed from.

BOYD, C.

NOVEMBER 28TH, 1904.

TRIAL.

HIxon v. REAVELY.

Waste—Tenant for Life—Sale of Timber—Proceeds to be Used in Repairs—Injunction—Damages—Reference.

Action by remaindermen against tenant for life for an injunction and damages in respect of alleged waste by cutting timber from the land and selling it. Trial at Welland.

BOYD, C.—All the niceties of the ancient learning as to waste which obtain in England are not to be transferred to a new and comparatively unsettled country like this province. It is, no doubt, laid down in the books that the tenant for life cannot cut down trees for repairs and sell the same, and that he must use the timber itself in making the repairs, and that the sale is waste: *Gower v. Eyre*, G. Cowp. 161. And this doctrine was reluctantly applied by Lord Thurlow in a case where the tenant felled the timber and applied the produce instead; but he called it a hard demand and refused to give costs: *Lee v. Alston*, 1 Ves. Jr. 78; S. C., 3 Bro. C. C. 37. This case, however, turned very much on the pleading, wherein defendant admitted wrongful cutting. So in *Summers v. Norton*, 7 Bing. and 5 M. & P. 660, the Court held that, in the absence of a proper plea, evidence could not be given that the tenant had applied for repairs other timber brought with proceeds of the timber cut, which was unsuit-

able for the purpose. This line of defence may, however, even in England, be set up by way of set-off in mitigation of damages, so that in a case of reasonable dealing by the tenant he may escape with nominal damages: see *Rennel v. Wither*, Manning's Digest of N. P. cases, cited in *Bewes on Waste*, pp. 50 and 53.

In England consideration is extended to ecclesiastical bodies, tenants for life, who are allowed not only to fell timber and dig stone to repair, but may sell such produce in order to expend the money in repairs: *Knight v. Morley*, Amb. 176; *Wither v. Winchester*, 3 Meriv. 427. . . .

A like relaxation of the strict rule obtains in the United States, and the authorities of that country, so much alike in its territorial conditions to our own, may well be regarded by Canadian Courts, as was done in *Drake v. Wigle*, 24 C. P. 405.

I am content to adopt the language of Mr. Justice Story as found in *Loomis v. Willows*, 5 Mason U. S. R. at p. 15: "If the cutting down of the timber was without any intention of repairs, but for sale generally, the act itself would doubtless be waste; and if so it would not be purged or its character changed by a subsequent application of its proceeds to repairs. But if the cutting down and sale were originally for the purpose of repairs, and the sale was an economical mode of making the repairs and the most for the benefit of all concerned, and the proceeds were bona fide applied for that purpose in pursuance of the original intention, it does not appear to me possible that such a cutting down and sale can be waste. It would be repugnant to the principles of common sense that the tenant should be obliged to make the repairs in the way most expensive and injurious to the estate." See *Miller v. Shields*, 57 Md. 71.

In this case the life tenant is the testator's widow, and the remaindermen are distant relatives. They complain of former cutting, but at so remote a period that I think it disadvantageous for all parties to entertain the complaint in that regard: *Bogot v. Bagot*, 32 Beav. 519.

The present complaint arises out of a transaction whereby proper lumber and shingles were to be obtained from a dealer, who was to take an adequate quantity of timber off the place in exchange, that on the place being unsuitable for the repairs needed. This was afterwards varied so that a sufficient amount of timber was to be sold to pay for the stuff required in repairing, but all connected with the one busi-

ness of making repairs on the very old house and buildings. The executor plaintiff admits that the buildings are in need of repairs of "\$200 or \$300 any way," and defendant's witnesses, who have examined with more care, say \$300 or \$400.

On the present evidence there does not appear to me to be any case of waste made out to justify granting an injunction, nor anything on which to award damages if the timber is cut with due regard to the situation of the bush and the cleared land, and no unreasonable amount is taken off to recoup the cost of the timber and shingles used and to be used in the repairs. If the parties are content to leave it at this, I would dismiss the action without costs—as the question is new in this country—but if either party seeks a reference as to what amount and in what locality the timber should be cut, I will send it to the Master to direct proceedings, and reserve costs of the reference.

CARTWRIGHT, MASTER.

NOVEMBER 29TH, 1904.

CHAMBERS.

FELGATE v. HEGLER.

Security for Costs—Infant Plaintiff in Jurisdiction—Adult Plaintiff and Next Friend out of the Jurisdiction—Separate Claims—Appearance—Praecipe Order.

Action by the father of an infant as next friend and also on his own behalf to recover damages resulting to the father and the infant from an injury to the infant for which it was alleged defendants were liable.

The father resided in England and the infant in this Province, as shewn by indorsement on writ of summons.

Defendants moved for an order for security for costs.

H. H. Clark, for defendants.

C. W. Kerr, for plaintiff, opposed the motion on 3 grounds: (1) as premature, because it was not shewn in the material that defendants had appeared in the action; (2) that an application should at least have been first made under

Rule 1199 for a *præcipe* order; and (3) that, inasmuch as the infant was within the jurisdiction, security for costs could not be ordered.

THE MASTER.—To the first objection I do not attach much weight. It was admitted on the argument that defendants' solicitors had accepted service and undertaken to appear. It was not disputed that they had appeared. If necessary defendants should have leave to file an affidavit proving this fact.

As to the second objection, I think this is not entitled to prevail. It is clear from the case of *McConnell v. Wakeford*, 13 P. R. 455, that an order could not be made on *præcipe*—"it would have been void." There could therefore be no object in making such an application.

The remaining ground of objection is more substantial. The facts of the present case are distinct from those in *Topping v. Everest*, 2 O. W. R. 744, and *McBain v. Waterloo Manufacturing Co.*, 4 O. W. R. 147.

But it does not seem that the fact of the infant plaintiff being within the jurisdiction has any bearing in the point under consideration.

I am therefore bound by those previous decisions, unless the case of *Smith v. Silverthorne*, 15 P. R. 197, following; *D'Hormusgee v. Grey*, 10 Q. B. D. 13, applies, as was contended by Mr. Kerr.

It seems, however, to be clearly distinguishable. Here there are two distinct actions being brought against defendants. This can now be done under Rule 185 in its present form, but there are none the less two separate actions.

The present motion will therefore be dealt with as was done in *Topping v. Everest*, *supra*.

Plaintiff can have such time as he may require (not exceeding six weeks) to give security.

In default the claim of the father will be struck out, and the matter will then be left for further consideration, or the order may be as in *McBain v. Waterloo Manufacturing Co.*, whichever is approved by the parties. The costs of this motion will be in the cause, as the exact point now arises for the first time.

CARTWRIGHT, MASTER.

NOVEMBER 30TH, 1904.

CHAMBERS.

LEACH v. BRUCE.

*Venue—Change of—County Court Action—Venue Improperly
Laid by Plaintiff—Costs of Motion to Change—Affidavit
—Solicitor.*

Motion by defendant to change venue and transfer action to the County Court of Northumberland and Durham from the County Court of Victoria.

H. E. Rose, for defendant.

Grayson Smith, for plaintiff.

THE MASTER.—It is admitted that the case comes within Rule 529 (b), which in *Corneil v. Irwin*, 2 O. W. R. 466, I held to apply to the County Court. I refer to what is said as to the proper practice in these cases in *Brown v. Hazell*, 2 O. W. R. 785.

For these reasons the order should prima facie be made. In this case it ought to go with costs to defendant in any event.

There is nothing to satisfy what was said in *Pollard v. Wright*, 16 P. R. 507, to be necessary to have a change of venue. Not only is there no proof of "a very strong case," but, strictly speaking, there is no proof that can be considered. The only affidavit is one of plaintiff's solicitor. According to *Hood v. Cronkrite*, 4 P. R. 279 (per Draper, C.J.), affidavits on these motions should be made by the party and not by his solicitor, who can only repeat what his client has told him. Attention was previously drawn to this in *Baker v. Weldon*, 2 O. W. R. at p. 434.

In the present case the solicitor's affidavit is vague and indefinite. If plaintiff could not speak more positively and precisely he could not expect to obtain an order to have the trial at Lindsay.

CARTWRIGHT, MASTER.

NOVEMBER 30TH, 1904.

CHAMBERS.

CLARKSON v. BANK OF HAMILTON.

*Discovery—Examination of Officer of Defendant Bank—
Local Agent—Previous Examination of Principal Officer.*

Action by the liquidator of the Palmerston Pork Packing Co. to set aside a chattel mortgage given by the company to defendants.

On 22nd June, 1904, the general manager of defendants was examined for discovery. He knew nothing of the facts. Subsequently on 5th November, 1904, the inspector was examined with no better results.

Plaintiff now moved for an order for the examination under Rule 439 (2) of the agent of defendants who was in charge of the Palmerston branch, and was present at the giving of the mortgage in question.

D. Henderson, for plaintiff.

L. F. Stephens, Hamilton, for defendants.

THE MASTER.—Where a corporation or other company is a party to an action, it would seem reasonable and convenient that the company should suggest for examination the officer or servant best qualified to give all information to which the opposite party is entitled. Such officer should prepare himself by obtaining full knowledge of all relevant facts, so that the examining party may be in as good a position as if contending with an individual.

That this is no more than the Rules require is shewn by Bray's Digest of Law of Discovery (1904), articles 17 and 18. The learned author refers to the following cases: Southwark Water Co. v. Quick, 3 Q. B. D. 315, at p. 321; Bolckow v. Fisher, 10 Q. B. D. 161, 169, 171. These were followed and applied in the recent case of Welsbach v. New Sunlight, [1900] 2 Ch. 1.

The principles of these English decisions would seem to be a fortiori under our practice. There the answers of the officer to interrogatories can be read as admissions against the company: Welsbach v. New Sunlight, supra, at p. 12, per Rigby, L. J.

The only question for determination here is whether in such a case as the present the interrogating party has been given all the information to which he is entitled.

Mr. Turnbull, the general manager, knew nothing of the chattel mortgage having been given until after it was executed.

Mr. Watson, the inspector, knows nothing of what took place when the mortgage was made, as he had left Palmerston before signature. He says that Mr. Hobson, their solicitor, and Mr. Campbell would know what was said and done at the time in question.

It appears from plaintiff's affidavit that application was made to be allowed to examine Campbell, but refused by defendants. I therefore think the order should go, with costs to plaintiff in the action.

The following cases in our own Courts seem to justify this disposition of the motion: Hartnett v. Canada Mutual Aid Assn., 12 P. R. 401, at p. 403; Smith v. Clarke, ib. 217, at p. 218; Going v. London Mutual Fire Ins. Co., 10 P. R. 642, at p. 643.

BOYD, C.

NOVEMBER 30TH, 1904.

TRIAL.

M McNULTY v. CITY OF NIAGARA FALLS.

Cemetery—Owner of Plot—Removal of Corpse—Mistake of Caretaker—Right of Action.

Action against the city corporation for damages for illegal removal of the remains of plaintiff's deceased child from her plot in a cemetery owned by defendants.

BOYD, C.—It may be assumed that the mother who buys a plot in a cemetery, and inters her dead child therein, has a right of action if the remains are improperly removed: Meagher v. Driscoll, 99 Mass. 281. Criminal liability exists even though the act be done thoughtlessly or ignorantly, but punishment should be so adjusted as not to impose any serious penalty in such a case: Rex v. Lyon, 2 T. R. 733; Sharpe's Case, D. & B. C. C. 160. Here the disturbance arose out of the apparently unauthorized proceedings of the

caretaker, who took upon himself to disinter the body and reinter it in another place within the cemetery enclosure. It is not proved but disproved that this transaction was directed or sanctioned by the corporation defendants. Upon being informed of what was done, steps were taken before action to restore the remains to the original place of sepulture, and to assure the plaintiff in her occupation and ownership of the plot.

The whole trouble originated in the blundering of purchasers of different plots, which resulted in the mistake made by the caretaker, who thought the body taken up had no right to be where it was, and proceeded to do what he believed to be right. No action is brought against him, and I do not see that the defendants are legally implicated in his misconduct: *Bolingbrook v. Swindon*, L. R. 9 C. P. 575.

The result is what I thought it should be at the conclusion of the trial. Action dismissed without costs.

MACMAHON, J.

DECEMBER 1ST, 1904.

TRIAL.

BARTLE v. PEARCE.

*Way—Right of—Easement—User—Statute of Limitations—
Declaratory Judgment—Injunction.*

Action for a declaration as to a right of way and an injunction restraining defendant from interfering with plaintiff's rights.

W. S. Brewster, K.C., for plaintiff.

T. Woodyatt, Brantford, for defendant.

MACMAHON, J.—James Grace was the owner in fee of the whole of lot 27 on the north side of Nelson street in Brantford (except a small part . . .), and he on 19th January, 1887, conveyed to defendant Pearce a portion of the lot . . . reserving thereout a right of way over a strip of land 10 feet 6½ inches in width on Canning street, and extending the same width 60 feet towards the rear of the said lot, to be used by Grace, his heirs and assigns, in common with Pearce (defendant), his heirs and assigns, as a means of ingress and egress for the use of the occupants of the buildings on lot 27. . . .

Defendant took possession of the premises conveyed to him almost immediately after he received his deed. At that time there were buildings on the other part of the lot owned by Grace to the north of the reserved right of way.

On 29th January, 1887, Grace conveyed the part of the lot owned by him to William A. Morrison, and he on 2nd December, 1903, conveyed the same to plaintiff.

Morrison entered into possession shortly after the conveyance to him, and used the right of way for three years in bringing in his coal and wood, without any molestation or objection on the part of defendant. That would bring the time of his continuously using it down to 1890, which would be only 14 years before action brought. He states that, after the three years had elapsed, for his own convenience he had gratings put in the sidewalk on Park avenue, and generally used these for the purpose of getting in his supplies of coal and wood, although occasionally he used the right of way for the purpose of bringing in such supplies. I find that on at least two occasions since 1890 he brought his wood in over the right of way and threw it over the fence at the rear, which runs east and west from the corner of his building to the west side of the lot. He said on some of the occasions when he required to go through the right of way, both before and since 1890, he found it blocked up by the delivery waggons and oil cans of defendant, and that he never requested defendant's permission to go through the right of way, but he did request him to remove the articles blocking the way in order that he might pass, and that he always claimed to be entitled to the use of the right of way. Perhaps after 1890 he did not exercise his rights very frequently, as it was only occasionally he required to use the way, but when so doing he was on each occasion asserting his right over the easement as a means of ingress and egress to and from his premises.

Defendant stated that plaintiff desired to purchase the right of way from him. That may well be. Defendant might have been willing for a consideration to extinguish his right of way, and plaintiff was desirous of acquiring defendant's interest therein. Plaintiff is somewhat uncertain as to what his object was in asking defendant if he was willing to sell his right to the easement. That, however, cannot affect the present issue.

There will be judgment for plaintiff declaring that he is entitled to the unobstructed use in common with defendant of the right of way as described in the deed from James

Grace to defendant, and also to an injunction restraining defendant from interfering with said right of way so as to prevent the free user thereof by plaintiff. There will likewise be judgment for plaintiff directing defendant to remove the covering placed over the said right of way by him, and the other obstructions placed by him on said right of way.

Reference may be had to *Mykel v. Doyle*, 45 U. C. R. 65; *McKay v. Bruce*, 20 A. R. 709; *Bell v. Goulding*, 23 A. R. 485; *Goddard*, 5th ed., pp. 109 and 540.

Defendant must pay plaintiff's costs.

ANGLIN, J.

DECEMBER 3RD, 1904.

WEEKLY COURT.

CITY OF TORONTO v. TORONTO R. W. CO.

Street Railways — Contract with Municipal Corporation — Specific Performance—Private Statute—Special Case—Hypothetical Question—Refusal to Answer.

After judgment (ante 330) had been delivered by ANGLIN, J., upon the special case stated in this action, further argument was heard as to the bearing of the Ontario statute 63 Vict. ch. 102, secs. 1 and 5, upon the question presented as to the right of plaintiffs to a decree for specific performance.

C. Robinson, K.C., and J. S. Fullerton, K.C., for plaintiffs.

W. Cassels, K.C., and J. Bicknell, K.C., for defendants.

ANGLIN, J.—This legislation (63 Vict. ch. 102, secs. 1 and 5), said to have been procured on behalf of the municipality to overcome the difficulty presented by the decision of the Court of Appeal in *City of Kingston v. Kingston Electric R. W. Co.*, 25 A. R. 462, had not been alluded to in argument before me. In these circumstances, I thought it advisable to stay the issue of formal judgment, to withdraw my opinion upon and answer to the 5th question submitted, and to direct that the special case should again be placed on the Weekly Court list, in order that I should have the advantage of hearing counsel upon the scope and effect of these special statutory provisions.

Counsel for plaintiffs state that the omission to refer to these provisions was not intentional. Mr. Robinson added that, in his opinion, they cannot effect the judgment upon the 5th question in the special case. He points out that, before plaintiffs can claim a decree for specific performance by virtue of this special legislation, they must give evidence that the conditions exist which impose obligations upon defendants under their agreement with plaintiffs, and of the nature and extent of the breaches of such obligations, after which, in the exercise of its discretion, the Court is to determine what things, if done or forborne, would constitute a substantial compliance with such obligations, and these things, when so determined, it shall order to be done or forborne.

Counsel for both parties state that the 5th question in the special case was propounded for the purpose of obtaining an adjudication upon the applicability of the decision in the Kingston case—and, should it be held to be in point, a review of that decision.

Had there been no such legislation as is contained in 63 Vict. ch. 102, the question, as framed, would necessarily have involved the determination which the parties avow it to be their desire to obtain. But it must be obvious that, if plaintiffs should make out a case, as outlined by Mr. Robinson, entitling them to the benefit of this special legislation, it will be wholly unnecessary to consider the applicability or the authority of the decision in *City of Kingston v. Kingston Electric R. W. Co.*, 25 A. R. 462. Upon a special case stated in an action only such questions of law can properly be raised as must sooner or later arise in the action: *Republic of Bolivia v. National Bolivian Navigation Co.*, 24 W. R. 361.

To answer the 5th question so as to meet the real purpose of the parties in presenting it, I should be obliged to assume that plaintiffs will fail to establish facts entitling them to invoke the special statutory provisions of 63 Vict. ch. 102. On the other hand, taking these provisions into account, at best only a hypothetical answer can be made to this question. It will be time enough to determine whether the remedy of specific performance is open to plaintiffs under the statute when they have established a case to which the statute applies; time enough to consider their right to this relief apart from the statute, when it becomes clear that the statute has no application. At present the question propounded cannot be answered without disregarding the well

established practice of this Court to decline to answer contingently questions involving problems which, in the ultimate working out of the action, may not present themselves for solution.

The Court is not bound to answer every question which parties litigant may see fit to put: *Viscount Barrington v. Liddell*, 2 DeG. M. & G. 480, 506. The undoubted right of the Court to decline to express "speculative opinions on hypothetical questions," or hypothetical opinions upon questions a categorical answer to which can only be given when certain facts not admitted have been established by evidence, finds in the 5th question of the present special case a subject which compels its exercise.

For these reasons I feel obliged to abstain from answering this question.

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CARTWRIGHT, MASTER.

DECEMBER 5TH, 1904.

CHAMBERS.

GOODWIN v. GRAVES.

Libel—Pleading — Privilege — Justification — Denial of Innuendo—Motion to Strike out Defences.

Motion by plaintiff to strike out paragraphs 2, 3, 4, 5, and 6 of the statement of defence.

The action was for libel. The alleged libel was a petition to a municipal council for the removal of plaintiff from the office of poundkeeper for alleged misconduct.

Paragraph 2 of the defence denied the innuendo; paragraph 3 was in justification; paragraph 4 alleged that plaintiff improperly impounded the animals of one Reid from malicious motives, and impounded no animals other than those of Reid; paragraph 5 stated that the matters set forth in the preceding paragraphs became and were matters of public notoriety and discussion and interest before and at the dates referred to; paragraph 6, that defendant acted in good faith and without malice and in the public interest, and that the publication was privileged.

I. F. Hellmuth, K.C., for plaintiff.

S. B. Woods, for defendant.

THE MASTER.—From the statement of claim itself it appears that the present is a case of qualified privilege: see *Willcocks v. Howell*, 5 O. R. 360.

Having regard to *Dryden v. Smith*, 17 P. R. 505 . . . I see nothing in the statement of defence with which I can properly interfere.

Paragraph 2 denies the innuendo, which defendant is surely entitled to do; whether he can succeed is another matter.

Paragraphs 4, 5, and 6 set up privilege and the grounds on which that claim is based.

The concluding sentence of the 4th paragraph—"From the date of his appointment until the said dates, plaintiff impounded no animals other than those of the said William Reid"—does not go far enough if intended to support the plea of justification . . . but it may be used in support of the plea of privilege. If the alleged fact is not true, then plaintiff has notice that it will be asserted at the trial, and he cannot complain of being forewarned, so that he can either dispute the statement or shew that no other cattle were at large, and let defendant disprove this if he can: see *Milling v. Loring*, 6 Q. B. D. 190.

Motion dismissed with costs to defendant in the cause.

BOYD, C.

DECEMBER 5TH, 1904.

TRIAL.

GRAND TRUNK R. W. CO. v. CITY OF TORONTO.

Railway—Liability of Municipal Corporation to Contribute to Maintenance of Gates at Crossings—Dominion Railway—Constitutional Law.

Action to recover proportion of cost of maintenance of gates, etc., at railway crossings in the city of Toronto. Three questions of law were raised: (1) Whether secs. 187 and 188 of the Railway Act of 1888 were ultra vires. (2) Whether the defendants were parties interested if the Act were not ultra vires. (3) Whether there was jurisdiction on the part of the Railway Committee of the Privy Council to direct the apportionment of cost as to the different crossings, because of defendants making application for different relief.

H. S. Osler, K.C., and D. L. McCarthy, for plaintiffs.

J. S. Fullerton, K.C., and W. Johnston, for defendants.

G. F. Shepley, K.C., for the Attorney-General for Canada.

No one appeared for the Attorney-General for Ontario.

BOYD, C., held that the questions were all expressly or by fair implication involved in the decision of the majority of the Court of Appeal in *Re Canadian Pacific R. W. Co. and County of York*, 25 A. R. 65, recognized in *Re Grand Trunk R. W. Co.*, 8 Ex. C. R. 349.

Judgment for payment of what is due by defendants with costs.

BOYD, C.

DECEMBER 5TH, 1904.

TRIAL.

NASMITH CO. v. ALEXANDER BROWN MILLING
AND ELEVATOR CO.*Contract—Sale of Goods—Statute of Frauds—Memorandum
—Signature—Conflicting Evidence.*

Action for damages for breach of a contract for the delivery of flour.

G. F. Shepley, K.C., for plaintiffs.

E. E. A. DuVernet and A. A. Miller, for defendants.

BOYD, C.—The contract sued on by plaintiffs is not proved as against defendants according to the requirements of the Statute of Frauds. The writings relied on are: (1) the paper of 30th December, 1903, signed by plaintiffs and addressed to defendants, to enter order for 2,000 barrels of flour and to have option for 3,000 barrels more, with delivery as required; and (2) the entry made in the contract book of defendants in these words: "1904, Dec. 30. By 2,000, P. Rose, \$4.10—cash discount of one per cent." This appears as one of a series of orders under heading on the page of Nasmith Co., and forms an item of an account which begins in the book in 1899. On the fly sheet of the book is stamped the name of defendants, with words in red ink above it, "New account 1st June, 1902"—the whole surrounded with a circular flourish. The meaning of this is that the company changed its organization at the date mentioned. The book began in 1899, and was carried on as the book of the new concern, and that is why the name and date of the new company appears on the fly sheet. . . .

The statement of the facts carries its own refutation of the name being stamped as a signature. Besides being placed there years before this transaction, it was not put there as in any sense a signature—but as a mark of time when the new proprietorship began. . . . The latest case I have found is *Hucklesby v. Hook*, [1900] W. N. 45. . . . In brief, the printed name at the beginning of the book cannot be, in Lord Ellenborough's phrase, appropriated to the particular contract as a signature, and it was not placed there in recognition of the contract sued upon: *Schneider v. Norris*, 2 M. & S. 286, 289. See also *Evans v. Hoare*, [1892] 1 Q. B. 593; *Bluck v. Gompertz*, 7 Ex. 862, 866; *Torret v. Cripps*, 27 W. R. 706.

There are other formidable difficulties discussed in argument, such as this: Supposing sufficient connection between the documents, and that the stamped name were to be treated as a signature, what is authenticated thereby? A contract other than that sued upon, viz., one for no more than the sale of 2,000 barrels at \$4.10—cash with certain discount. The written evidence in this case, if all admissible as parts of one contract, shews non-agreement on one essential point, i.e., as to whether it was to be a time contract or one of delivery as required—upon which there is no satisfactorily proved consensus. The very object of the statute is to get rid of the conflicting evidence which arises upon the recollection of parties and their bias towards themselves, in the absence of contemporaneous writing when the contract is made.

Action dismissed with costs.

CARTWRIGHT, MASTER.

DECEMBER 6TH, 1904.

CHAMBERS.

MOLSONS BANK v. HALL.

Summary Judgment—Rule 603—Action on Foreign Judgment—Defence—Defective Service of Process—Leave to Defend—Terms.

Motion by plaintiffs for summary judgment under Rule 603 in an action upon a judgment recovered by plaintiffs in the County Court of Vancouver, British Columbia.

C. S. MacInnes, for plaintiffs.

E. F. B. Johnston, K.C., for defendant.

THE MASTER.—Defendant's affidavit denies that he was shewn the original of the writ, but admits service of a copy, and that he gave himself no further concern about the matter. He states that he has also a good defence on the merits to the original cause of action, and also a large counterclaim against plaintiffs. Defendant was not cross-examined.

I thought at first that, under the case of *Anderson Produce Co. v. Nesbitt*, 1 O. W. R. 818, defendant was entitled to defend as of right. But, on sending for the papers, I found that on 9th January, 1903, this judgment was reversed by the Chancellor. . . . The fate of the action is to be seen in 2 O. W. R. 430, and the nature of the attempted defence.

I think, having regard to all the facts of the present case, that the best order to make is to dismiss the motion for speedy

judgment; costs in the cause. But, as a term, defendant must forthwith put in his defence and facilitate the progress of the action in every way. Plaintiffs are to be at liberty to move against the defence to be delivered as they may be advised, notwithstanding the dismissal of the present motion. It may be that under the British Columbia procedure it is not necessary to shew an original writ, even if demanded by a defendant. No other defence is suggested in defendant's affidavit affecting the validity of the judgment.

ANGLIN, J.

DECEMBER 6TH, 1904.

TRIAL.

JOHNSTON v. BARKLEY.

Res Judicata—Action to Set aside Assignment of Chose in Action—Previous Garnishee Proceeding in Division Court—Establishment of Validity of Assignment—Parties—False Evidence—Fraud—Costs.

Action by a creditor of defendant Nora Barkley to set aside an assignment (dated 16th February, 1904) of her salary as a school teacher for 1904 to defendant Zenas Barkley, her father, as fraudulent and void.

J. Leitch, K.C., and J. A. C. Cameron, Cornwall, for plaintiff.

G. I. Gogo, Cornwall, for defendants.

ANGLIN, J.—. . . The only substantial defence is . . . *res judicata*, founded upon a judgment of the 3rd Division Court in Stormont, Dundas, and Glengarry, in a garnishee proceeding to which the present plaintiff and defendants were parties, plaintiff as primary creditor, defendant Nora Barkley as primary debtor, defendant Zenas Barkley as claimant under the . . . assignment. Upon the hearing of the garnishee summons in the Division Court the validity of this assignment was the question for determination. By suppressing material facts and by giving evidence that was wilfully false, the claimant succeeded in securing from the learned junior Judge an adjudication that the garnishees (the board of school trustees) were not indebted to the primary debtor. The primary creditor moved for a new trial. In dismissing this application the learned Judge expresses his opinion that defendant Zenas Barkley is thoroughly honest and that the assignment to him was made in perfect good faith. How such a conclusion was reached, even upon the partial statement of facts before the Division Court Judge,

I find it difficult to understand. A more glaring and palpable case of a fictitious assignment for a fraudulent purpose can scarcely be imagined than that disclosed before me at the trial of this action.

But I am not sitting in appeal from the judgment pronounced in the Division Court, and, since that judgment has "the same force and effect as a judgment of a court of record," with regret I am obliged to give effect to defendants' plea of *res judicata*.

Though not obtained in a direct proceeding between plaintiff and defendant as such, this Division Court judgment, disposing of proceedings taken under sec. 202 of the Division Courts Act, is, I think, clearly within the purview of sec. 7 of that statute, and therefore equivalent to a judgment of a court of record: see *Re Perras v. Keefer*, 22 O. R. 672; *Radford v. Merchants Bank*, 3 O. R. 529; *Dingwall v. McBean*, 30 S. C. R. 441.

Mr. Leitch strongly urged the fraudulent means taken by the present defendants to procure the judgment in the Division Court, as an answer to their plea of *res judicata*, the fraud consisting in perjury. I am not able to agree with his contention. . . . [Reference to *Kerr on Fraud and Mistake*, 3rd ed., p. 301; *Earl of Bandon v. Beecher*, 3 Cl. & F. 497; *Cole v. Langford*, [1898] 2 Q. B. 361; *Baker v. Wadsworth*, 67 L. J. Q. B. 300; *Flower v. Lloyd*, 6 Ch. D. 297, 10 Ch. D. 327; *Black on Judgments*, 2nd ed., p. 296.]

While constrained, therefore, giving effect to defendants' plea of *res judicata*, to dismiss this action, I mark my sense of their dishonesty by refusing to allow them costs.

TEETZEL, J.

DECEMBER 6TH, 1904.

TRIAL.

SCOTT v. SPRAGUE'S MERCANTILE AGENCY OF
ONTARIO, LIMITED.

*Fraud and Misrepresentation—Action for Damages for
Fraudulent Representations Inducing Contract—Failure
to Prove Actual Fraud.*

Action for damages for alleged fraudulent representations by defendants' agent by which plaintiff was induced to enter into a contract with defendants for collection of debts and to give his note for \$250 as a retainer fee, which, being transferred before maturity, plaintiff was compelled to pay.

J. H. Rodd, Windsor, for plaintiff.

M. K. Cowan, K.C., for defendants.

TEETZEL, J.—Defendants did not at the trial dispute the representations proved by plaintiff, but contended that they were true, and that if in fact they were untrue they were not fraudulently made.

The evidence to prove falsity of the representations was not satisfactory to me, and, while I am in doubt as to the representations made by defendants' agent being literally true, I am clearly of opinion that plaintiff has failed to shew any fraud or deceit on the part of defendants or their agent, and therefore cannot in any event recover in this action.

In this form of action it is necessary for plaintiff to prove actual fraud, which may be done either by shewing that a false representation has been made knowingly or without belief in its truth, or recklessly, without caring whether it be true or false. See *Derry v. Peek*, 14 App. Cas. 337; *Angus v. Clifford*, [1891] 2 Ch. 449; *Lowe v. Bouverie*, [1891] 3 Ch. 82; *White v. Sage*, 19 A. R. 136.

The evidence in this case falls entirely short of any proof of actual fraud, and the action must be dismissed with costs.

ANGLIN, J.

DECEMBER 7TH, 1904.

WEEKLY COURT.

RE BAINSVILLE SCHOOL SECTION.

Public Schools—Formation of New School Section—Award of Arbitrators—Statutory Requirements—Area of Section—Number of Children of School Age—Determination of Arbitrators—Jurisdiction—Power of Court to Review.

Motion by the municipal corporation of the township of Lancaster and others to quash an award of arbitrators appointed by the county council of the united counties of Stormont, Dundas, and Glengarry, under sec. 42, sub-sec. 2, of the Public Schools Act, 1901. The arbitrators, upon the appeal of the present respondents, residents of the unincorporated village of Bainsville and its immediate vicinity, whose petition for the erection of a new school section the township council had refused, decided in favour of the formation of such new section, to be composed of parts of existing sections numbers 1, 2, 4, and 5 of the township of Lancaster.

D. B. Maclellan, K.C., for applicants.

J. A. Chisholm, Cornwall, for respondents.

ANGLIN, J.—Upon the argument of the motion I intimated that, in my opinion, I should not consider the grounds of alleged inconvenience, financial difficulties, etc., urged

in support of the motion. The only other grounds (and upon these I reserved judgment) are that the new school section, contrary to the requirements of sec. 12, sub-sec. 3, of the Act of 1901, is not more than four square miles in area and contains fewer than 50 children between the ages of five and twenty-one years, whose parents or guardians are residents of the section, and that one of the existing school sections will, as a result of the proposed change, be in a like predicament. Upon this ground Liddell, Co.J., one of the five arbitrators, dissents from the impeached award, in which his four colleagues concur. Though there is no express statement by the majority of the arbitrators to that effect, I must assume that, having the statutory requirement in mind, they did actually find either that the new school section contains the specified number of children of school age, or that it comprises an area of more than four square miles, and that school section No. 1, as altered, would still fulfil the statutory requirements, if these should be held to apply to existing sections thus altered.

Mr. MacLennan ingeniously argued that the arbitrators have no jurisdiction to make an award not in conformity with sec. 12, sub-sec. 3. and that for this reason their determinations in regard to areas and school population, as a foundation of jurisdiction, are open to review upon the present motion. Whatever might be the position if there were no evidence upon which the finding I have assumed the arbitrators to have made could be founded, there being some such evidence, I cannot substitute any conclusion I might reach upon a consideration of its value or of its comparative weight for that at which they have arrived. The arbitrators clearly had jurisdiction to enter upon the inquiry which they made into these very matters. No mistake of law or fact is apparent upon the face of the award; neither is any such mistake admitted by the respondents, or by the arbitrators: *Re Grant and Eastwood*, 22 Gr. 563; *Lalla v. Wallbridge*, 3 P. R. 157. Assuming that the question is one of jurisdiction, as contended by Mr. MacLennan, I cannot on that account entertain this motion.

The analogy between the position of arbitrators and that of an inferior court in an inquiry into and a finding upon facts essential to jurisdiction, seems very close. The conclusion reached—if based upon any evidence—will not be reviewed in the case of the inferior court upon motion for prohibition: *Wilkes v. Home Life Association*, 8 O. L. R. 91, 3 O. W. R. 589, 675, 744; nor in the case of arbitrators upon motion to quash or set aside their award. In attempting

such a review, the Court would, in either case, constitute itself an appellate tribunal.

The motion, therefore, fails and must be dismissed with costs.

BOYD, C.

DECEMBER 7TH, 1904.

TRIAL.

MACKENZIE v. CITY OF TORONTO.

Municipal Corporation—Waterworks—Right of Outsider to Water Supply—Contract—Easement—Discrimination.

Action for an injunction and a declaration of plaintiff's right to the continuation of a supply of water from defendant's waterworks for the house and grounds of plaintiff outside the limits of the city.

W. Laidlaw, K.C., and J. Bicknell, K.C., for plaintiff.

J. S. Fullerton, K.C., and W. Johnston, for defendants.

BOYD, C.—. . . The rights of plaintiff . . . are supposed to arise under the prosecution of the waterworks system belonging originally to the Yorkville waterworks and passed on by way of transfer to the municipality of Yorkville in 1875. Thereafter the by-law 316 (14th August, 1876), was passed, whereby it was enacted that the village should purchase land in the township of York wherein to establish or construct a reservoir and pay for land whereon the retaining basin was constructed . . . and to lay main pipes from the intersection of Cottingham street and Avenue road to the proposed reservoir. This work was carried through part of the McMaster property, which was procured or acquired in some way (not in evidence) for that purpose, and thereafter water for Yorkville was drawn from this new reservoir in the county of York, through an extension of the pipes from the limits of Yorkville to the new-acquired property. Mr. McMaster's house was supplied with water from the new extension main pipe, but in what way or under what arrangement (if any) is not disclosed. This work was done in the exercise of powers conferred upon the Yorkville Waterworks Co. by its incorporating statute.

The right to get water as claimed in this case depends upon the status of plaintiff deriving under his purchase of the McMaster land. It may be assumed that if the owner of the McMaster land at the time of the construction of the extension of the original waterworks in Yorkville (temp.

1875) had a right to be served from these village waterworks, it would be a long step towards the attainment of plaintiff's suit. I find no trace of the existence of any such right as a legal claim vested in any one who was not an inhabitant of the local municipality of Yorkville. . . .

The property of Mr. McMaster was in the state of intermediate grounds and lands lying between the reservoir and the village, through which the line of pipes conveyed the water from the high land to the lower levels of the village. But, being outside of the municipal limits, there was no beneficial or actual usufruct of the water itself attributable to this mere vicinage to the main service pipe proceeding from the reservoir to the village. Whatever permission, easement, or privilege in the use of the water was conceded to Mr. McMaster, it was a revocable and voluntary concession or contract—not binding upon the original corporation (the Yorkville Waterworks Co.), and indeed not within the purview of its corporate powers.

Now, as the stream cannot rise higher than its source, no more can the claims of a part purchaser of the McMaster estate transcend those of its first proprietor in regard to the water service of the village, now vested in the city of Toronto. . . .

The Toronto authorities had power to discriminate as to non-residents of the city, and to supply water on special terms as to them, in a manner which might not obtain as to resident consumers: *Attorney-General v. City of Toronto*, 23 S. C. R. 519. . . .

It is not till 1891 that water is supplied through the city to Mr. Janes, the predecessor of the present plaintiff. . . . It does not follow, because the city may have agreed to supply McMaster for some undisclosed consideration, that the like privilege is to be extended to the owners of the various subdivisions of his property. Domestic service of water was, however, supplied, and, it is to be assumed, in the ordinary way as to outside consumers, to Mr. Janes in 1891, and that has been continued to the present plaintiff, on payment of the rates fixed by the city.

But I see no reason for holding that the city could not at any time end the arrangement and refuse to supply water on any terms to those who could not assert the rights of citizenship. The city had power to pass the by-law to cut off the supply on six months' notice to these outsiders, and power to amend that so as to provide for giving no more than 48 hours' notice or no notice, so far as municipal and statutory power is concerned. . . .

In brief, plaintiff is not an inhabitant of the city, his premises are in the county of York, and he can only deal as a stranger with the city for water supply under the section already referred to. Defendants are not bound to deal with him, are not under obligation to supply water to him, and the Courts in such cases do not interfere: *Weale v. Weale*, 1 J. & W. 358, followed in *Wren's Case* by Jessel, M.R., of which a note is made in *Michael & Will's Law Relating to Gas and Water*, 5th ed., p. 313. See also *Cooke v. Newton*, 38 Ch. D. 56, 14 App. Cas. 698.

Action dismissed with costs.

TEETZEL, J.

DECEMBER 8TH, 1904.

CHAMBERS.

SAUNDERSON v. JOHNSTON.

Trial—Setting down—Close of Pleadings—Rights of Defendant—Injunction Motion—Terms of Order.

Appeal by defendant from order of Master in Chambers setting aside defendant's setting down of the action for trial at the Toronto non-jury sittings, and the notice of setting down.

The action was for an injunction, and on 31st October MAGEE, J., heard a motion by plaintiff for an interim injunction and adjourned it till the trial, directing plaintiff to deliver his statement of claim on 14th November and set the action down for trial at the Toronto sittings within two weeks after the close of the pleadings, and that, in default of plaintiff so pleading and setting down, the motion should be dismissed.

The statement of claim was filed within the time limited, and on 16th November defendant joined issue thereon, and, treating the pleadings as closed, under the authority of *Malcolm v. Race*, 16 P. R. 330, and *Hare v. Cawthrope*, 11 P. R. 353, set the case down and gave notice thereof, under Rule 542, which provides for either party setting the action down for trial immediately after the close of the pleadings.

W. N. Tilley, for defendant.

H. M. Mowat, K.C., for plaintiff.

TEETZEL, J.—With great deference to the learned Master, I cannot read the order of Magee, J., as imposing any qualification upon or limiting defendant's right under Rule 542. I think, therefore, defendant was entitled to set the case down, and that the appeal should be allowed with costs to defendant in any event.

BRITTON, J.

DECEMBER 8TH, 1904.

TRIAL.

GILBERT v. IRELAND.

Costs—Action to Establish Will—Failure of Charges of Fraud and Undue Influence—Costs out of Estate.

An action to establish a will, tried with a jury at Milton. Judgment was given establishing the will and directing probate. The question of costs was reserved.

BRITTON, J.—Should persons who, in opposing probate of a will, set up fraud and undue influence and fail, ever get costs out of the estate, and if so in what cases? . . .

[Reference to Goodacre v. Smith, L. R. 1 P. & D. 359; Orton v. Smith, L. R. 3 P. & D. 23; Tippet v. Tippet, L. R. 1 P. & D. 54; Smith v. Smith, ib. 239; McAuley v. Kemp. 27 Gr. 442; Aylwin v. Aylwin, [1902] P. 203; McFadyen v. McFadyen, 27 O. R. 598; Wilson v. Grant, 22 Gr. 39.]

Upon the peculiar facts and circumstances which came out upon the trial, and considering fairly the conduct of the beneficiary, I think the case is well within the rule by which the Court allows costs out of the estate, and I so order as to all the parties.

BOYD, C.

DECEMBER 8TH, 1904.

TRIAL.

AMES v. CONMEE.

Broker—Purchase of Shares for Customer on Margin—Moneys Advanced to Keep up Margins—Recovery—Instructions—Usual Course of Dealing—Practice of Brokers—Discharge of Customer—Obligation of Broker to Sell—Several Orders Included in One Contract—Interest.

Action by brokers against a customer to recover moneys paid to keep up margins on shares bought by plaintiffs for defendant, and interest thereon.

D. E. Thompson, K.C., and W. N. Tilley, for plaintiffs.
C. Millar, for defendant.

BOYD, C.—A person who employs a broker to act for him in the purchase of stock is taken to be aware of the usual course of dealing in such cases and to authorize his agent to act in accordance therewith: Sutton v. Tatham. 10 A. & E.

27, 29; *Grissell v. Bristowe*, L. R. 3 C. P. 112. The rule of law further appears to be that if the instructions are of such uncertain terms as to be capable of different meanings, and the agent bona fide adopts one which is in accordance with the ordinary course of business, the principal cannot afterwards disavow the act and authority of his agent, because some other outcome was in his mind: *Ireland v. Livingston*, L. R. 5 H. L. 395, 416.

Having acted under instructions, the broker is entitled to be indemnified by the principal against loss or liability properly incurred by him as agent in the course of the particular transaction, and that even though it be of a merely speculative character, so long as it does not trench on illegality: *Thacker v. Hardy*, 4 Q. B. D. 685; *Forget v. Ostigny*, [1895] A. C. 318.

Plaintiffs in this case were instructed to buy stock (of named company) for defendant. He was told that it could be purchased at 30½, and he said he was prepared to risk \$3,000 and take that in stock. He was told that would be margin for 300 shares of the stock—a ten point margin. This much defendant recollects. Fraser, acting for plaintiffs, says that defendant wanted the stock to be carried, on putting up a deposit, and Fraser then said that he would have to put up ten per cent. margin and maintain it. It is, however, doubtful whether the maintaining the margin was discussed between them. Defendant says he understood he was giving \$3,000 to buy the stock and that he would have no further liability. . . . But, as he was informed that these 300 shares were being dealt with on a 10 per cent. margin, each share being for \$100 and purchasable at 30½, he must be taken to have knowledge that his payment would not cover the price of the shares.

Now, the order was in effect to acquire 300 shares, and the duty of the broker was to do what would be required to perfect that order, and this was done by his advancing other part of the price and obtaining the rest by repledging with the Philadelphia broker through whom the purchase of the stock was concluded. This advance of money on account of defendant, though not, in terms, discussed, was justified by the law and practice of brokers: *Bailey v. Williams*, 7 C. B. 885.

The brokers thus came under obligation to carry the stock for defendant, and were liable for and had expended the balance of the price over and above the \$3,000 payment made by defendant.

I find no sufficient evidence of any discharge of defendant from the obligation to save harmless the agents from the balance due on this account. . . .

The parties were at arm's length in December, 1902, and if the shares then sold by plaintiffs could be regarded as earmarked for defendant, his liability would cease at that point; but the law appears to be recognized in this country, as it is in the United States, that so long as the broker retains and has in hand shares sufficient in number and kind to answer what have been bought for the principal, no sale of like shares bought for the principal ends the contract: *Horton v. Morgan*, 17 N. Y. 170; *Janissy v. Hart*, 58 N. Y. 475; *Clarkson v. Snider*, 10 O. R. 568.

The brokers were not obliged to sell the stock, though default was made in keeping up the margin, until they received direction from the principal to sell, and none such was given here. They might have sold to protect themselves at an earlier stage, but no legal liability can be imputed to them because they abstained as they did, in the absence of evidence to shew want of good faith and ordinary caution: *Kerr v. Murton*, 7 O. L. R. 751, 3 O. W. R. 801.

The objection as to several orders being included in one contract at the start does not appear to be material as the transaction has worked out. *Beckhausen v. Hamblett*, [1900] 2 Q. B. 18, is answered by *Scott v. Godfrey*, [1901] 2 K. B. 726.

In the absence of any promise to pay a greater rate of interest than the statutory on money advanced for defendant, I do not think that a greater rate should be allowed than the statutory 5 per cent., and that not compounded. To this extent the account should be modified by the Registrar, and judgment should go for the principal due and interest so computed, with costs of action.

BRITTON, J.

DECEMBER 9TH, 1904.

WEEKLY COURT.

RE HUGHES.

*Will—Construction—Distribution of Estate—Period for—
Event—Acceleration—Income—Accumulation—Infant.*

Petition by the executors of the will of Maria Agnes Hughes for the advice and opinion of the Court upon certain questions in reference to the administration of the estate.

The testatrix died on 15th April, 1902. By her will, apart from certain specific bequests, she left her estate to the

petitioners in trust for the purposes set out in the will. The following clauses of the will were material: "The income . . . shall, during the 5 years next after my decease, be paid by my executors to such of my unmarried daughters as shall not at the time of my death have entered the conventual life, in equal shares, and so that from the time any one of my daughters shall marry or shall enter conventual life her share of such income during the said period of 5 years or any part thereof, as the case may be, shall cease and shall be equally divided amongst my other daughters. . . . And at the end of the said period of 5 years, I direct that my said son Vincent James shall receive one-sixth of my estate to hold for himself absolutely, and that the income of the remaining five-sixths be paid to all my daughters in equal shares during their natural lives, the shares of any daughters dying without issue to be equally divided between my surviving children—the daughters receiving the income and my son the principal as the case may be, and the share of any daughter dying and leaving lawful issue to be divided amongst such issue when they attain the full age of 21 years, and to be expended for their benefit during their minority."

On 3rd September, 1904, upon the marriage of Annie C. Hughes, all the daughters of the testatrix were married or in conventual life. One daughter, Madeline Coffee, died on 21st February, 1904, leaving one child.

W. N. Ferguson, for petitioners.

C. A. Moss, for Vincent J. Hughes.

F. W. Harcourt, for the infant.

BRITTON, J.—1. Did Vincent James Hughes become entitled on 3rd September, 1904, to be paid one-sixth of the estate?

The general rule is that acceleration results in every event which removes the prior estate out of the way. This, however, is outside of that rule, as it is not the case of a "prior estate" within the meaning of it. There is no gift to Vincent James Hughes of a reversion or a remainder. It is merely the postponement for a definite short term of the time when Vincent shall come into possession in his own right of a portion of the property of testatrix, which she thought proper for such short term to place under the management of trustees. There is no failure of an estate to be managed or of persons to manage, but simply failure on the part of the testatrix to say expressly what, in the event of the contingency which has arisen, shall be done with the income during the unexpired portion of the term of five years.

No doubt one of the objects. and possibly the only object, the testatrix aimed at in fixing the term of 5 years was to provide for such of the unmarried daughters as had not taken vows. It may, however, well be that for other reasons the testatrix desired to have her estate as a whole administered for five years, and that Vincent should not get his share until the expiration of that period. But, whether there were other reasons or not, this is a case in which the statement of limitation is so clear that it must prevail, and cannot be shortened. The answer to the question must be in the negative.

2. Should the income of the estate since 3rd September, 1904, be divided or allowed to accumulate?

I am of opinion that as to the income of the estate since 3rd September, 1904, and until the expiration of the 5 years, there is an intestacy, and that it should be paid out to the children, who are entitled, in equal portions, and that one-sixth, the share of Madeline, shall be applied for the support and maintenance of her infant child.

3. It was, I think, the clear intention of the testatrix that under no circumstances should there be any division of the whole estate or the setting aside of any portion of the corpus within the term of 5 years. The trusts created by the will should be executed, and the one-sixth belonging to the infant should not be separated until Vincent becomes entitled to his share.

4. The trustees should keep the estate invested until the time arrives for ascertaining and setting apart one share, and then all the shares should be ascertained, separated, and set apart.

5. The trustees are entitled to retain possession of the share of the infant until the separation of her share.

The present opinion and order upon the case presented will be without prejudice to any application, when the shares are separated, or upon new facts or conditions, that may be necessary on behalf of the infant or her guardian, or by the official guardian, or by the trustees, for handing over or payment into Court of the infant's share or for any order, advice, or direction in reference thereto.

Costs of all parties out of income.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING DECEMBER 17TH, 1904.)

VOL. IV. TORONTO, DECEMBER 22, 1904.

No. 17

TEETZEL, J.

DECEMBER 9TH, 1904.

CHAMBERS.

WHITESELL v. REECE.

Costs—Scale of—Jurisdiction of County Court—Trespass to Land—Amount Involved—Title to Land.

Appeal by defendants from taxation of plaintiffs' costs by local officer at St. Thomas.

Plaintiffs were owners of the remainder in a farm valued at \$1,500, and defendant Reece was life tenant thereof, and defendant Payne a purchaser from her of timber on the farm. The action was for an injunction and damages for cutting and removing the timber. The trial Judge found for plaintiffs, and assessed the damages at \$400, to be paid into Court and paid out to plaintiffs on death of defendant Reece, who was to have the interest in the meantime. This judgment was varied by a Divisional Court (5 O. L. R. 356, 2 O. W. R. 160), by directing that defendants should at once pay to plaintiffs \$180.

Plaintiffs' costs were taxed on the High Court scale.

W. J. Tremear, for defendants, contended that Rule 1132 applied, and that on the judgment as entered plaintiffs were entitled to County Court costs only with set-off by defendants of High Court costs.

C. A. Moss, for plaintiffs, contra.

TEETZEL, J.—I think, notwithstanding that the judgment as drawn up awards plaintiffs only \$180, that it is quite clear, in the light of the judgment delivered by the Court, that the subject matter involved was the whole \$400, and therefore that the action would not have been maintainable

in the County Court under sub-sec. 13 of sec. 23 of the County Courts Act.

I am also of opinion that the County Court would have no jurisdiction by reason of the statement of defence, in paragraph 4 of which it is alleged that the lands were subject to a mortgage under which \$200 per annum was payable to one Jane Scealey during her life, and that defendant Reece had paid in all upon the mortgage \$1,600 to Jane Scealey, and claimed to be subrogated to the rights of the latter . . . ; and in paragraph 10 defendant Payne alleged that he was the bona fide purchaser for value of the timber bought by him, with no notice of plaintiffs' adverse claim.

I think that the effect of these defences is to raise the question of title to an interest in land of a greater value than \$200, and therefore the action would not be maintainable in a County Court by virtue of sub-sec. 1 of sec. 22 of the Act.

Appeal dismissed with costs.

IDINGTON, J.

DECEMBER 12TH, 1904.

TRIAL.

COLEMAN v. ECONOMICAL MUTUAL FIRE INS. CO.

Fire Insurance—Interim Receipt—Immaterial Variation in Policy — Prior Insurance not Assented to — Insurance in Plaintiff's Name—Mortgagee—Agent—Ratification.

Action to recover \$2,000 upon a policy of insurance issued by defendants insuring a house in Toronto against fire.

A. J. Russell Snow, for plaintiff.

William Davidson, for defendants.

IDINGTON, J.—Plaintiff sues upon a policy of fire insurance dated 10th February, 1902, which was issued in pursuance of an interim receipt dated 28th January, 1902, providing for an insurance to the extent of \$2,000, subject to the terms and conditions contained in the policies of the company issued at the date of the receipt.

The policy sued upon, being the only one issued, was delivered to plaintiff about a month later. It differs somewhat from the form put in evidence as that used on the date in question, but in no respect as to the condition which raises the issue here. I think all that can be said in regard to the departure from the form then in use is, that it was an obvious

error to have used the later form, and nothing turns upon the error.

Should plaintiff rest her case, as she did at the trial, on this receipt alone, then the policy she would be entitled to have considered would be one having all the statutory conditions with variations then used by this company.

The defence is rested upon No. 8 of the statutory conditions. That condition provides that the company shall be free from liability for loss, "if there is any prior insurance in any other company, unless the company's assent thereto appears" on or indorsed on the policy.

This contract is so plain that it requires nothing in this case but to ascertain whether or not the insured had a prior insurance. Nothing was said to the agent of defendants as to a prior insurance. There was no written application. There is nothing to complicate the case, as often has occurred when the question of prior insurance has been raised, by reason of representation or want of it. The prior insurance in question here was one of \$2,000 in the Commercial Union Assurance Company, by virtue of a policy dated 22nd January, 1898, for the term of three years, and renewed by payments and receipts so as to have it kept in force in plaintiff's favour at the time of the fire. She is the person that the policy refers to as having paid the premium, and named as the assured.

The loss is made payable to George Gooderham, who held a mortgage on the property. It is said that he was the person who effected this insurance, and that he did it as a mortgagee, without consulting plaintiff.

The facts are, that the mortgage is dated 14th August, 1888, for \$3,500, signed by plaintiff and her husband, who are called in the instrument the mortgagors, though she is shewn upon the face of it to have been the registered owner under the Land Titles Act, and both covenant with the mortgagee that they will insure the buildings to the extent of their insurable value. The husband admits that he paid the premiums on such insurance, when charged up in the account of the mortgagee, with interest. The principal was also reduced by such payments. These payments may or may not have been made during the currency of the last renewal of the particular policy referred to as issued by the Commercial Union. I infer : . . that the premium on the first issuing in 1898 of the policy was thus paid. The wife intrusted all that sort of business to the husband as her agent. It is clear, I think, that he did what he pleased in regard to payments on the mortgage and the insurances, and she was

satisfied that he should do so. It was he who effected this insurance now in question. It would seem as if all that she could possibly have had a chance of saying in respect of the contention that this Commercial Union insurance was not to be held as hers was swept away by her adoption of it in proving the claim under it, as if hers, and receiving the proceeds and passing them over to the mortgagee.

This is clearly such a ratification as to constitute all that had gone before as hers—as if done by her—and her husband's acts as her acts. The essence of ratification is that it relates back to the original making of the contract and confirms it.

[Reference to *Hagedorn v. Oliverson*, 2 M. & S. 485; *Smith v. Thomson*, 13 East 274; *Luccina v. Crawford*, 2 B. & P. N. R. 269; *Williams v. North China Ins. Co.*, 1 C. P. D. 757; *Dafoc v. Johnston*, 7 C. P. 55, 59; *St. George's Church v. Sun Ins Co.*, 55 N. W. Repr. 909.]

I find, therefore, that there was a prior insurance within the meaning of statutory condition No. 8.

I think the variation in condition No. 33 or 35, according to the form of policy looked at, does not affect the statutory condition No. 8, but is supplementary to Nos. 8 and 9 and intended where these have been, or rather No. 8 has been, complied with, to limit the company's liability to its proper proportion of the whole of the insurance supposed to exist, even if part of this total may turn out to have been invalid.

Action dismissed with costs.

ANGLIN, J.

DECEMBER 12TH, 1904.

TRIAL.

KENT v. MUNROE.

Bank—Insolvency—Winding-up—Claim on Promissory Note Maturing after Order—Set-off—Deposit in Bank to Credit of Indorser—Note Made by Treasurer and Indorsed by Reeve of Municipality for Municipal Purposes—Personal Liability—Rectification of Instrument.

Action by the liquidators of the insolvent *Banque Ville Marie* against the treasurer and reeve of the township of *Roxborough* upon a promissory note, dated 21st April, 1899, at four months, for \$333.05, made by "Alexander Munroe, treasurer township of *Roxborough*," payable to the order of "D. H. McDiarmid, reeve of *Roxborough*," and indorsed "D. H. McDiarmid, reeve of *Roxborough*."

J. Leitch, K.C., and J. A. C. Cameron, Cornwall, for plaintiffs.

D. B. MacLennan, K.C., and C. H. Cline, Cornwall, for defendants.

ANGLIN, J.—The municipality of Roxborough did their banking business with the Avonmore branch of La Banque Ville Marie, the municipal funds being deposited to the credit of an account intituled "Alex. Munroe, treasurer of Roxborough, Moose Creek."

By by-law No. 10, passed on 20th April, 1899, the municipal council of Roxborough purported to authorize the treasurer and reeve "to borrow from the Ville Marie Bank such money as may be required for present use in connection with the drainage works to be completed in the Fraser creek." Money being immediately required for preliminary survey work, the note in question was discounted with the Avonmore branch on 24th April, and its proceeds, \$325, placed to the credit of the account above mentioned. . . . The \$325 appears to have been paid out on 27th April for survey work on the Fraser creek drainage scheme. The notice of presentation of the petition to wind up the bank was given on 9th August, and the winding-up order was made on 10th August, 1899. The balance then standing to the credit of the Alex. Munroe account was \$823.23. The note in question matured on 24th August, 1899, and was duly protested for non-payment. Three dividends of 5 per cent. each have been declared by the liquidators with the approval of the Court, on 20th June, 1900, 4th March, 1901, and 24th April, 1902, respectively. Upon the account of the township in the name of Munroe the three dividends amounted to \$123.48, which is still in the hands of the liquidators. Defendant Munroe does not appear to have had any personal account with the bank. Defendant McDiarmid, however, had such an account. It is in evidence that the liquidators hold a sum of \$82.25, representing the three dividends upon an account standing in his name, the balance to the credit of which at the date of the suspension . . . appears to have been \$548.34. To these moneys it is admitted that McDiarmid is beneficially entitled.

The evidence of the manager of the Avonmore branch of the bank in 1899 is, in effect, that the loan on the note in question was regarded by him as a loan to the municipal corporation; that defendants affixed their signatures to the note in their official capacities, and solely to evidence the liability

of the municipal corporation; that there was no idea or intention of either Munroe or McDiarmid incurring any personal liability; and that the proceeds of the note were passed to the credit of what was deemed the township account. . . .

There can be no doubt that such was the true position of this matter, and had there been no suspension of the bank . . . this note at maturity would have been charged up by the bank to the account of the municipality standing in Munroe's name, and of this the municipality would not have been in a position to complain: *Bridgewater Cheese Co. v. Murphy*, 23 A. R. 66, 26 S. C. R. 443; *Armstrong v. West Garafraxa*, 44 U. C. R. 515; *Molsons Bank v. Town of Brockville*, 31 C. P. 174.

But, the bank having gone into liquidation, it is now sought to treat the liability upon this note as a personal debt of the reeve and treasurer (though the municipality, through its counsel at the trial of this action, expressed its willingness to recognize the obligation as its own), principally for the purpose of defeating a right asserted on behalf of defendants to set off, pro tanto, against the claim of the liquidators upon the note, the balance standing to the credit of the municipality in the name of Munroe. Upon the record no right of set-off is claimed in respect of the balance which stood to the credit of defendant McDiarmid. . . .

The borrowing of money in the manner and for the purpose for which it was borrowed is apparently not authorized by the Municipal Act. But, if sued upon the consideration, the municipality would probably have great difficulty in maintaining a defence; yet their liability for money lent, if found, would not suffice to relieve defendants from personal liability on the note. Is there such personal liability?

There being no ambiguity in the form of the note, nothing to indicate that the municipality was intended to be a party to it, I am unable to bring this case within such authorities as *Fairchild v. Ferguson*, 21 S. C. R. 484, *Linders v. Melrose*, 2 H. & N. 293, and *Alexander v. Sizer*, L. R. 4 Ex. 103. The stringent rule excluding parol testimony of intention upon questions of construction applies, and precludes my giving effect to the very clear evidence of the real purpose for which the note was drawn, by holding it to be what the parties thought it, rather than what in fact it is.

Neither is the way open to order any rectification of the instrument to make it conform to what was clearly the intent of all parties. Mutual mistake is fully made out. The parties used a form the legal effect of which they misunderstood. The obstacle to reformation presented by the fact

that this was a mistake of law, formidable though it be, might, perhaps, in view of the "unquestionable and flagrant" character of the mistake, be overcome: *Snell v. Ins. Co.*, 98 U. S. R. 85; *Story's Eq. Jur.*, 2nd Eng. ed., pp. 83, 85. But a difficulty, which is, I fear, insurmountable, arises from the fact that a rectification of this note so as to constitute it an obligation of the municipality would in fact make of it a new contract, and that of a body not a party to the instrument being dealt with, and not liable upon it. Nor is any such relief sought.

I am, therefore, constrained to find that defendants are personally liable upon the note.

Notwithstanding the circumstances of this case, in which (*In re Central Bank and Yorke*, 15 O. R. at p. 630) "there is inherently a persuasive equity to set off one against the other," because the liability on the note and the credit upon the deposit may be regarded as "substantially but the different sides of the same transaction," I agree that the indebtedness of the bank for moneys of the municipality, which it held to the credit of the Munroe account, cannot be set off against the personal liability of these defendants upon the note in suit.

No such difficulty exists, however, in regard to the balance of \$548.34 which stood to the credit of defendant *McDiarmid*. Though no set-off in respect of this deposit is claimed in the statement of defence, in order, if possible, to work out a measure of substantial justice to defendants, I shall, without any hesitation, *propria sponte*, allow any amendment of pleading proper to raise this defence.

It, therefore, becomes necessary to deal with Mr. Leitch's contention that because the note in suit matured after the bank had gone into liquidation, no set-off can be claimed against it in respect of a balance standing to the credit of the deposit account of a party sued by the liquidators upon such note . . . *Vanier v. Kent*, Q. R. 11 K. B. 373, in which, under identical circumstances, a Quebec depositor was held to have no right of set-off. I have no doubt that such is not the law in Ontario. . . .

[Reference to *Macfarlane v. Norris*, 2 B. & S. 783; *Mason v. Macdonald*, 45 U. C. R. at p. 120; sec. 57 of the Dominion Winding-up Act.]

This promissory note was, at the time of the commencement of the winding-up, a claim accruing due to the bank, *debitum in præsentī solvendum in futuro*, at all events as to the liability of the maker. In a proceeding upon that claim—if the business of the bank were not being wound up—the

right of the depositor when sued on the note to claim set-off would be indisputable under English law: *Anderson's Case*. L. R. 3 Eq. 337. The statute in terms preserves that right in cases to which it applies. . . . [Reference to *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q. B. at p. 579; *Ontario Bank v. Routhier*, 32 O. R. 67; *Berry v. Brett*, 6 Bosworth (N.Y.) 627.

But it may be argued that the liability of the indorser, because conditional upon non-payment by the maker at maturity and the giving of due notice of dishonour, was not, at the time of the commencement of the winding-up, a debt due or accruing due to the bank within the meaning of sec. 57 of the Winding-up Act, and that, therefore, the indorser when sued has no right of set-off. In *Vanier v. Kent*, Mr. Justice Wurtel says of this section: "What this clause means, and what appears to have been intended, is that any right which any party having dealings with the bank may have had to claim compensation (set-off) is not taken away by the effect of the winding-up under the Act; but the right to be enforced must be one which would have existed if the bank had not been placed under the operation of the Act. The section maintains an existing right, but it does not create a new one." Such being its object and purview, neither should this section be held to deprive a defendant of any right of set-off, which under the *lex fori* he would have had against the bank, if solvent and itself the plaintiff in this action. Though perhaps the inchoate liability of an indorser before maturity is not within the language of sec. 57, I decline to construe that section as so exhaustive and so prohibitive of all claims of set-off, which it does not in terms declare to exist, as to prevent this Court giving effect to a claim of set-off so eminently just and equitable as that which I propose to allow the defendant *McDiarmid* to set up in regard to the balance to the credit of his deposit account. His liability existed potentially at the time of the commencement of the winding-up; it does not arise out of any subsequent transaction, and the many authorities denying the right of set-off in such cases may on that ground be distinguished.

Upon the defendants exercising the privilege accorded to them of amending their defence, judgment may be entered allowing them the set-off which I have permitted them to plead, declaring the claim of plaintiffs satisfied thereby, and the right of defendant *McDiarmid* to rank upon the estate of the bank in the hands of the liquidators in respect of the balance of his claim upon his deposit account, and dismissing this action.

In view of the fact that the set-off to which I have given effect was not pleaded, and that to allow it an amendment is made without any request of defendants at this stage of the case, there will be no order as to the costs of this action.

Should defendants not amend as indicated within one month, there must be judgment for plaintiffs with costs.

ANGLIN, J.

DECEMBER 13TH, 1904.

CHAMBERS.

GOODWIN v. GRAVES.

Libel—Pleading—Privilege—Justification—Denial of Innuendo—Motion to Strike out Defences.

Appeal by plaintiff from order of Master in Chambers, ante 449, dismissing plaintiff's motion to strike out certain paragraphs of the defence in an action for libel.

I. F. Hellmuth, K.C., for plaintiff.

S. B. Woods, for defendant.

ANGLIN, J., allowed the appeal in part and ordered that the 4th paragraph of the defence be struck out, with leave to defendant to amend. Costs of motion and appeal to plaintiff in the cause.

ANGLIN, J.

DECEMBER 14TH, 1904.

CHAMBERS.

RE BRAND.

*Will—Construction—Devise—Estate Tail—"Heirs of Body"
"Heirs and Assigns"—"In Fee Simple."*

Motion by executors for order declaring construction of will. Testator devised his real estate to his executors, their heirs and assigns, to have and to hold the same "to the use of Nancy G. Skinner . . . for and during the period of her natural life, and at her decease to the use of the heirs of her body begotten, and their heirs and assigns, in fee simple forever;" on her death without issue a gift over in fee.

R. T. Harding, Stratford, for executors and for Nancy G. Skinner and three adult children.

F. W. Harcourt, for infants.

ANGLIN, J.—It can not be said that, by any explanatory context, the testator has made it clear that in employing the words “heirs of the body” he intended to use them in any other than their ordinary legal sense. The addition of the words of inheritance “their heirs and assigns” does not alter the legal significance of the limitation to which they are appended: *Mills v. Seward*, 1 J. & H. 733. The further words “in fee simple” add nothing to the legal effect of the words “heirs and assigns,” and, following them, must be regarded as purely supererogatory. By the insertion of this unnecessary phrase the testator does not convey an intention that the words “heirs of the body” are to be taken as words of purchase. Neither is such an intention expressed in or fairly deducible from the fact that he uses the words “heirs of her body” in disposing of his residuary personalty, the income of which he had directed his executors to pay to Nancy G. Skinner for life. Devising estates of the same quality, the testator, by the operation of the rule in *Shelley’s case*, must be held to have conferred upon Nancy G. Skinner an estate tail in the lands in question. Reference to *Van Grutten v. Foxwell*, [1897] A. C. 658; *In re Cleator*, 10 O. R. 326; *Evans v. Evans*, [1892] 2 Ch. 173.

Costs to all parties out of the estate.

ANGLIN, J.

DECEMBER 14TH, 1904.

CHAMBERS.

RE HANMER.

Will—Construction—Codicil—Bequest of Life Interest with Power of Appointment by Will—Bequest of Corpus to Legatee in Default.

Motion by Louis E. Hanmer for order declaring the construction of a codicil to the will of Clark Hanmer, whereby his trustees were directed to retain and invest the sum of \$10,000 and to pay the income thereof to the testator’s son, the applicant, during his natural life, and, upon his death, to pay the corpus to such persons as he should by his last will direct.

S. B. Woods, for applicant.

T. J. Robertson, Newmarket, for executors.

ANGLIN, J.—This codicil, taken by itself, gives Louis merely a life interest in the income, with a power of appointment by will, in default of the exercise of which the testator would be intestate as to the disposition of the corpus after Louis’s death.

While an unlimited gift of income carries to its donee the corpus as well, no authority can be found holding that a gift of income for life has this effect. Nor does that superadded power of appointment, which can never be exercised in his own favour, increase in any wise the interest of the donee of this power in the fund which is its subject.

Though the notice of motion asks specifically for the construction of the codicil, yet in general terms it refers to both will and codicil. By clause (e) of his will the testator had devised the rest and residue of his property to Louis. The corpus of the \$10,000, of which the income by the codicil is given to Louis, would not, under the scheme of the will as originally framed, have been residuary estate. By a preceding clause, (d), which the codicil revokes, Louis E. Hanmer was given the entire principal of his father's estate, except a sum set aside to produce an annuity for his mother; the testator by this codicil revokes the gift to his son of the principal of his estate; by the same instrument he expressly confirms, inter alia, the residuary bequest to him, which, the testator being otherwise intestate as to the corpus of the \$10,000 (except that he gives his son a power of appointment by will over it), therefore, carries that corpus. I cannot conceive that the testator so intended, yet he has in fact given the corpus of the fund to his son in default of his exercising the power of appointment. The authorities seem uniform that such provisions constitute an absolute gift entitling the legatee to have the fund paid over. The cases are collected in Theobald on Wills, 5th ed., p. 429. Costs to both parties out of the fund.

ANGLIN, J.

DECEMBER 14TH, 1904.

WEEKLY COURT.

WENDOVER v. NICHOLSON.

Administration—Estate of Deceased Person—Moneys in Hands of Son—Gift—Corroboration—Limitation of Actions—Request or Direction—Trustee—Reference—Report—Judgment—Irregularity—Execution—Costs.

Appeal by defendant Edward Nicholson from report of local Master at Bracebridge and motion by plaintiff for judgment on the report.

R. U. McPherson, for appellant.

O. M. Arnold, Bracebridge, for plaintiff.

ANGLIN, J.—The Master charged the appellant with \$300 received by him from his father. Defendant denied

liability, setting up that the money was a gift, or if not, that the Statute of Limitations barred plaintiff's claim. Defendant's evidence that his father made him a gift of this \$300 was wholly uncorroborated. There was some doubt as to when the money came into defendant's custody, whether, as he averred, in 1889, or, as plaintiff said, in 1896. This action was begun in 1898. . . . Assuming that this money has been in Edward Nicholson's hands since 1889, he is not entitled to retain it. If he is an express trustee, which he may without any violent presumption be held to be, still retaining this money he cannot set up the statute. If not, having failed to establish a gift to himself, he must be held to have received the money for safe-keeping for his father, to be dealt with as he might request or direct. No request having been made and no direction given, the statute never ran in the son's favour: *In re Tidd*, [1893] 3 Ch. 154. The appeal upon this branch fails.

The Master also charged the appellant with \$412 received by him in 1895. . . . For want of corroboration appellant failed to establish his contention that there was a gift to him of these moneys. The appellant's liability to a charge of \$399 on account of the Clark mortgage was admitted before the Master. Upon the material it cannot be found that the Master erred in fixing \$331 as the amount with which the appellant should be credited in respect of his claim for services performed and goods furnished.

Appeal dismissed with costs.

Plaintiff moved to confirm a judgment which she procured to be irregularly entered upon the Master's report after defendant's appeal had been launched. This cannot be done, but plaintiff is now entitled to judgment upon the report in the usual form. She must pay to defendant all costs to which he has been put in endeavouring to protect himself against the irregular judgment and subsequent steps taken to enforce it. These costs will, after taxation, be set off pro tanto against plaintiff's judgment for debt and costs. The execution must go with the judgment on which it was founded. Two-thirds of costs of reference must be paid by Edward Nicholson. No costs of motion to confirm report.

IDINGTON, J.

DECEMBER 15TH, 1904.

TRIAL.

SHEPPARD PUBLISHING CO. v. HARKINS.

Master and Servant — Contract — Servant to Engage in no other Business—Breach of Contract—Account of Profits—Damages—Costs—Scale of—Set-off—Apportionment.

Action against a person who had been in the employment of plaintiffs as advertising manager for an account and damages for breach of contract.

A. B. Aylesworth, K.C., and W. J. Elliott, for plaintiffs.

W. R. Riddell, K.C., and W. T. J. Lee, for defendant.

IDINGTON, J.—Plaintiffs are an incorporated company of printers and publishers. . . . Defendant had been employed by plaintiffs in several minor positions. . . . In March, 1889, after he had, in the beginning of that year, been appointed by plaintiffs as their advertising manager, defendant desired to have his contract reduced to writing. Plaintiffs' general manager, Mr. Sheppard, assented to this, and they together talked over the terms thus agreed to be reduced to writing. Mr. Sheppard promised, as the result of this, to write a letter, which the defendant could accept, and he (Sheppard) says he did so immediately . . . and handed the letter . . . to defendant, and received from defendant an unconditional acceptance by letter now lost. Defendant says nothing to vary this story, save in the important particular that, after he received Mr. Sheppard's letter, he pointed out that the exclusive employment terms were too rigid, and the power to terminate the agreement, as the letter provides, by a three months' notice, was not satisfactory, and thereupon the letter was withdrawn, and in the course of a day or so another . . . was submitted, duly signed by the company . . . and this second letter is the one to which he (defendant) replied by the unconditional acceptance. . . .

I accept Mr. Sheppard's version of the story as to the letters. I find only one letter from plaintiffs and an unconditional acceptance of it by defendant's reply. That one letter from plaintiffs is to be found copied in the letter book of plaintiffs, and is as follows:

"Toronto, March 29, 1889.

"Mr. John A. Harkins, Toronto.

"Dear Sir.—In order to effect a definite understanding as to your services and the terms on which we understand you to be working, we hand you this letter, to which we expect

a written acceptance. During 1889 you are to receive \$15 a week and 5 per cent. commission on all business you personally bring into the office in the way of commercially good contracts or cash advertisements. If during 1889 your business amounts to \$5,000 in good contracts and cash advertisements, for the three years following you are to receive \$15 per week and 5 per cent. on all the advertising business done by the papers published by and under the management of the Sheppard Publishing Co., this not to include business in papers published by us by contract for other publishers. You are to agree to devote your entire time and attention to the advertising interests of the company, and to engage in no other business during the period covered by this agreement. This agreement can be cancelled by either party giving 3 months' notice.

"The Sheppard Publishing Co., Limited,
"E. E. Sheppard, managing director."

Defendant continued till the expiration of the 4 years' term provided for in this letter before any change was made in the conditions of his service. And after the expiration of the 4 years, on two or three occasions there were changes made in the way of increasing or decreasing defendant's compensation, but no other change of terms in any way was ever spoken of.

I think that continued service, in such circumstances, must be taken to have been subject to such terms in the original contract as were not inconsistent with the modifications agreed upon by the parties, or necessarily to be implied from changes made by the lapse of time, or in the conditions upon which in fact the parties continued their old relations. I think one of the terms of the original contract that stood thus unchanged was that which the letter thus expresses: "You are to agree to devote your entire time and attention to the advertising interests of the company and to engage in no other business." . . . See Taylor on Evidence, sec. 196 et seq., and cases cited there. . . .

Plaintiffs allege that defendant entered upon several business projects which conflicted with his discharge of duty under this contract for the exclusive service which he bound himself thereby to give plaintiffs. It may be that this contention is quite right. But plaintiffs go further and claim to have an account of the profits made by defendant out of these ventures and to have defendant ordered in each case to pay over such profits to them.

I asked plaintiffs' counsel for authority for such a claim, where arising out of circumstances such as these . . . , but they were unable to furnish me with any beyond the law as laid down in several text books. For example, Bowstead's Law of Agency, p. 140 . . . says: "No agent is permitted to acquire any personal benefit in the course or by means of his agency without the knowledge and consent of the principal." This definition of the class of cases in which the breach of the servant's duty or agreement entitles the master to an account of profits is almost identical with that given in Wright's Law of Principal and Agent, 2nd ed., p. 187, and Evans, p. 287, to which I was referred. The law thus laid down cannot be questioned, but I fail to see how it can be applied to the instances of alleged breach of duty or agreement in question here. Not one of them can fairly be said to have arisen in the course of defendant's agency, or by means thereof to have given defendant a profit.

Defendant, upon the request of Mr. Bain, a bookseller, advanced money to aid in the publication of a directory known as "Toronto Elite Directory," in which were inserted advertisements that quite probably formed the most profitable part of the venture. These were not got, except in two cases, by defendant's intervention or soliciting. A man was engaged, on defendant's recommendation, for the special purpose of soliciting such advertising.

The only relation that this transaction had to the course of defendant's agency was the fact that the friendship of Mr. Bain may have sprung from defendant's calling upon him from time to time to procure advertisements for plaintiffs' "Saturday Night," and the further fact that the money advanced him was probably part of the fruits of defendant's earnings in the agency. The money was defendant's own, and the friendship his asset also.

The advertising that defendant was required, by the course of his agency, to look after, was only, as things then were, for "Saturday Night;" no other publication is known to have been carried on by plaintiffs at that time.

That defendant was to be compensated for his advances of money and trouble in looking after the collection of accounts got in connection with the financing of the directory project, by a half share of the profits, instead of, as might have been, a high rate of interest, can surely make no difference. Can it be said that if a high rate of interest beyond the usual profits arising from lending at interest had been in such a venture received by defendant, he must ac-

count? Such a claim can only be sustained upon the principle that prevailed in the days of serfdom. . . .

[Reference to Smith on Master and Servant, 5th ed., p. 132.]

It seems to be rather a bold venture in this realm of law to ask the Court to produce such concrete results as plaintiffs seek for here, based only upon an ancient and almost forgotten speculative theory. The expansion of the common law has not extended thus far.

Words such as "entire time and attention" must be read with limitations. . . . I think they cannot be given a wider meaning than was given the like words and phrases in . . . *Dean v. McDowell*, 8 Ch. D. 348, followed in *Mitchell v. Lister*, 21 O. R. 318, and relied upon in *Jones v. Linde British Refrigeration Co.*, 2 O. L. R. 428.

The kind of advertising defendant was to look after was such as was available and suitable for the "Saturday Night" newspaper. Whether the advertising now in question, as going into the "Elite Directory," might or might not in some cases have found its way into "Saturday Night," if the "Elite" had never existed, must be purely speculative. It was not got in the course of defendant's agency or by reason of it. I fail to find any law to support a claim for an account in cases beyond this line in the course of the agency.

It seems, therefore, as if plaintiffs are driven to rely upon the breach of contract and the damages proximately flowing therefrom. What is true of the "Elite" is much more plainly true of each of the other ventures in which defendant put his money. I cannot, therefore, find any ground for giving relief by way of directing defendant to account for the profits of any of these alleged causes of complaint.

Besides this way of looking at the case, covering all the claims, I think defendant has as to the matter of the posters and the album a complete defence on the ground of plaintiffs' acquiescence. There is enough in the admissions of plaintiffs' manager, the knowledge of plaintiffs' secretary, and the uncontradicted evidence of defendant as to knowledge in both manager and secretary, to support this defence, so far as it relates to these two matters. And I may add that, generally speaking in regard to these two items, I think that when defendant's evidence conflicts with that of either the manager or the secretary, that of defendant is more likely to be correct. . . . On the point of acquiescence see *Smith v. Redford*, 19 Gr. 274, 278.

Defendant was, I think, in the case of the Press Publishing Co., so engaged with its affairs as to be liable for a breach

of his contract with plaintiffs. Plaintiffs are entitled to at least nominal damages for that breach.

The same may be said of the "Elite" in regard to the collecting of accounts due by defendant, to the extent of which his account book produced is some evidence. That and the two advertisements he got form a breach. To this defendant is entitled to set up the Statute of Limitations, but upon terms. The parties have come down to trial upon the issue of account or no account. The pleadings, however, make claim for damages and make it wide enough to entitle plaintiffs to judgment for breach of defendant's contract, and I therefore conclude that judgment must be entered for plaintiffs in respect of these breaches arising out of the "Elite" and the Press Publishing Co., for \$5 damages with costs upon the County Court scale.

This will not result in imposing more burthen upon defendant than if I provided for his amending and pleading the Statute of Limitations, which, if he prefer it, I would let him do, upon payment of costs, which would be upon the higher scale, of all the proceedings incidental to the "Elite" item of plaintiffs' claim, from the date of the filing of the defence to the end of the trial.

As the case in this result was one, though possibly within the jurisdiction of the Division Court, that might properly have been brought in the County Court, but need not have been brought in this Court. I shall not prevent defendant setting off the difference between his High Court costs and what the County Court costs might have been, had the suit been brought for and confined to the two matters for and in respect of which I find plaintiffs entitled to recover damages.

But, as I dismiss all other claims made by plaintiffs, save as stated, all costs beyond these properly taxable in accordance with my findings in respect of damages for these two causes of action, and incidental to the proceedings in respect of them, to and at the trial hereof, must be borne by the respective parties who incurred them. . . .

[Reference to Woodyatt's Law of Agency, p. 43 et seq., and cases cited there; Morrison v. Thompson, L. R. 9 Q. B. 480; Massey v. Davis, 2 Ves. Jr.; De Bussche v. Alt, 8 Ch. D. 286; Kirkham v. Peel, 43 L. T. 171; Foster v. Stewart, 3 M. & S. 191; Hill v. Allen, 1 Ves. 83; Williamson v. Hine, [1891] 1 Ch. 390; Yates v. Finn, 13 Ch. D. 839; Eversley on Domestic Relations, p. 881; Story on Agency; Makepeace v. Jackson, 4 Taunt. 770.]

TEETZEL, J.

DECEMBER 15TH, 1904.

TRIAL.

MCDOWELL v. MACKLEM.

Company—Shares—Offer to Sell—Acceptance—Attempted Withdrawal—Promissory Note—Liability.

Action on a promissory note for \$1,500, payable 30 days after date, given by defendant in payment for 2,000 shares in the stock of the National Oil Co., a foreign corporation with head office at Lima, Ohio.

J. L. Counsell, Hamilton, for plaintiff.

W. M. McClemont, Hamilton, for defendant.

TEETZEL, J.—Plaintiff, as indorsee, would, upon the undisputed facts, be subject to any defences which would be maintained in an action by the payees (the National Oil Company).

Defendant signed a memorandum addressed to the National Oil Co. in these words:

“Hamilton, May 4, 1904.

“Gentlemen,—Herewith find enclosed \$1,500, for which send me 2,000 shares of National Oil Company’s stock, at the rate of 75 cents per share, par value \$1, fully paid, and non-assessable,” and delivered the same, together with the note sued on, to one Stewart, who was a sub-agent of the company under plaintiff, who was the general agent of the company for the sale of its shares.

Stewart canvassed defendant for the sale of the shares, and gave him, among other literature, a circular signed by the company, containing an offer to sell the shares after 1st May at 75 cents per share of the par value of \$1, and I find that Stewart was further authorized to offer the shares to defendant at that price, and he was also authorized to accept defendant’s note instead of cash for the purchase money.

Defendant pleaded certain misrepresentations by Stewart, but at the trial I found that no misrepresentations had in fact been made.

The defence chiefly relied upon was that three days after signing the memorandum and giving his note, and, as he alleges, before his application for the stock had been accepted by the company, and before the stock applied for had been allotted to him, defendant wrote the National Oil Company withdrawing his application for stock, and demanding the return of his note.

The stock in question formed part of a large block of stock which had already been issued by the company, and stood in the name of a trustee for the company, and upon sales being made blocks of this stock would be transferred and new certificates issued to the purchasers.

From the certificate issued to defendant, which he refused to accept, it would appear that it was not in fact issued until some days after his notice of withdrawal, which was dated 17th May, and in these words:

"I hereby withdraw my application in your company for stock. Please do not issue any stock to me. Kindly return my note."

In my opinion, the effect of the transaction between defendant and Stewart was an offer by the company in its circular and repeated by Stewart, its agent, to sell the stock to defendant, and an acceptance thereof by defendant, and that such offer and acceptance closed the bargain, so that neither the company nor defendant could, without the consent of the other, withdraw therefrom.

In other words. defendant's memorandum was not an application for shares or a unilateral proposal to buy or subscribe for same, subject to be accepted by the company, and the shares to be allotted by the directors, and the case is not, therefore, in my opinion, within Pellatt's Case, L. R. 2 Ch. 527, or Nasmith v. Manning, 5 S. C. R. 417, and other authorities cited by Mr. McClemon, but it comes within such cases as Jackson v. Turquand, L. R. 4 H. L. 305, and Nelson Coke and Gas Co. v. Pellatt, 4 O. L. R. 481, 1 O. W. R. 395, and cases there cited.

There should therefore be judgment for plaintiff for \$1,500, and interest from 6th June, 1904, and costs.

MACMAHON, J.

DECEMBER 15TH, 1904.

TRIAL.

GUELPH PAVING CO. v. TOWN OF BROCKVILLE.

Contract—Paving Work—Measurements—Certificate of Engineer.

Action to recover \$1,576.28, the balance alleged to be due to plaintiffs on 13th January, 1899, on a contract dated 15th March, 1898, for the construction of granolithic sidewalks in the town of Brockville.

F. E. Hodgins, K.C., for plaintiffs.

J. A. Hutcheson, K.C., for defendants.

MACMAHON, J.—. . . The form of tender put in by plaintiffs was prepared by defendants, and recites that the sidewalks were to be constructed under a local improvement by-law, and were to be completed in accordance with the conditions and specifications. . . .

The sidewalks were of varying widths, from 4 to 12 feet, the greater portion, however, being 5 feet in width, and were completed and paid for by defendants according to the estimates of Mr. Smellie, their engineer, who in making the measurements included the length and width of the different walks, but did not include therein the 12 vertical inches on the curb side of the walk, from which the front boards were removed, under clause 10 of the specifications, and which was required to be smoothed over with cement mortar. . . .

The words used in the tender and in clause 4 of the contract, according to which payment for pavements is to be made, are, "per superficial foot;" and "superficial," according to the Century Dictionary, means "lying in, or on, or pertaining to the superficies or surface, not penetrating below the surface. . . ."

The superficial area of a sidewalk must mean that exposed portion of it on which persons can walk, and the whole of this was included in the measurements made by the engineer for the town.

By the 4th clause of the contract payments are to be made monthly. "on the production of the engineer's certificate as the work progresses, less 20 per cent., which is to be retained till the final completion and acceptance of the work, and then to be paid on the production of the engineer's certificate of the completion of the work." . . .

The engineer for the town, by measuring the full surface widths of the different sidewalks by their lengths, was giving to plaintiffs all they were entitled to be paid for under the specifications and express terms of the contract. But, even had he been in error as to his mode of measuring the work, there being no fraud, plaintiffs would be bound by his certificate: *Sharpe v. San Paulo R. W. Co.*, L. R. 8 Ch. 597, at pp. 612-3; *Jarvis v. Dalrymple*, 11 U. C. R. 393.

Action dismissed with costs.

DECEMBER 15TH, 1904.

DIVISIONAL COURT.

REID v. SNOBELEN.

Administration Bond—Liability of Sureties for Administrator—Money in Hands of Administrator—Dual Capacity—Guardian of Infants—Termination of Period of Administration—Passing Accounts before Surrogate Judge—Estoppel.

Appeal by plaintiff from judgment of BRITTON, J., 3 O. W. R. 656, dismissing action.

J. H. Moss, for appellant.

R. M. Thompson, Blenheim, for defendants.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.—I entirely agree with the conclusion to which my brother Britton came, and with the reasons assigned by him for reaching that conclusion. . . .

Whatever might be the effect of what was done (in the accounting before the Surrogate Judge by Rufus Earl) in an action between the appellant and Rufus Earl . . . it is clear, I think, that the sureties for Earl as administrator (the respondents), assuming that what was done amounted to an adjudication by the Surrogate Judge that Earl had in his hands as administrator \$315.73 which he was liable as administrator to pay to the appellant, are not bound by that adjudication. . . . [Reference to *Zimmerman v. Kemp*, 30 O. R. 465.]

Appeal dismissed with costs.

DECEMBER 15TH, 1904.

DIVISIONAL COURT.

ANDERSON v. CITY OF TORONTO.

Way—Non-repair—Injury to Person—Cause of Injury—Finding of Trial Judge—Appeal.

Appeal by plaintiff from judgment of TEETZEL, J., dismissing without costs an action (tried without a jury) brought to recover damages for injuries sustained by plaintiff

by a fall upon a sidewalk on Carlaw avenue, in the city of Toronto, which plaintiff alleged was out of repair and dangerous.

J. E. Jones, for plaintiff.

J. S. Fullerton, K.C., for defendants.

The judgment of the Court (BOYD, C., MEREDITH, J., MAGEE, J.), was delivered by

MEREDITH, J.—The parties present for our consideration upon this appeal but one question, and that purely a question of fact—whether the trial Judge erred in refusing to find that plaintiff's injury was caused in the manner testified to by him at the trial—in refusing to give effect to his unsupported testimony in that respect.

Obviously the trial Judge had advantages in determining that question which we have not; he saw and heard all the witnesses, and, though his reasons expressed at the trial for reaching the conclusion that plaintiff has since his injury learned to believe, contrary to the fact, that the proximate cause of that injury was a contact between his foot and the raised plank, went largely to the probabilities of the case, it by no means follows that his judgment was not affected by the demeanour of the witnesses.

The case seems to be just such an one that, had the Judge believed and given effect to plaintiff's testimony at the trial, we could not have rightly interfered; and . . . there is even less ground for interference, for there is, in the circumstances to which he refers, much to support his finding.

Immediately after the accident plaintiff gave as the cause of it the slipperiness of the walk only. No matter how much pain he may then have been suffering, that can hardly account for his not attributing it to the true cause, if it really were that which he now asserts—a violent contact between his foot and the plank impelling him forward so far that where he fell was 18 feet beyond the place of contact. It was not until the action was pretty well advanced that the cause was plainly stated as that now relied upon. It is true that it is by no means impossible that plaintiff's position upon the ground, immediately after the accident, might have been as it was, if it happened in the way he now asserts; but it is at least more probable with the happening of it, as the Judge has found.

Appeal dismissed without costs.

DECEMBER 16TH, 1904.

DIVISIONAL COURT.

SAUNDERSON v. JOHNSTON.

Trial—Setting down—Close of Pleadings—Rights of Defendant—Injunction Motion—Terms of Order.

Appeal by plaintiff from order of TEETZEL, J., ante 459.

H. M. Mowat, K.C., for plaintiff.

Strachan Johnston, for defendant.

THE COURT (BOYD, C., MEREDITH, J., MAGEE, J.), after hearing the appeal, delayed the disposition of it until a pending motion by the plaintiff to postpone the trial should be disposed of by the Judge at a sittings for the trial of actions, and being certified that that motion had been refused, made no order upon the appeal except that the costs of it be paid by plaintiff to defendant.

DECEMBER 16TH, 1904.

C.A.

CROSBY v. DAWSON.

Master and Servant—Injury to Servant—Workmen's Compensation Act—Negligence—Defect in Machinery—Proximate Cause of Accident—Knowledge of Defect—Evidence—Jury—Damages.

Appeal by defendants from judgment of BOYD, C., in favour of plaintiff, upon the findings of a jury, in an action for damages for injuries sustained by plaintiff by the alleged negligence of defendants while in their employment.

Defendants were contractors on the wheel pit and walls of the Canadian Niagara Power Co., and plaintiff was a mason and stonecutter in their employment. On 17th July, 1903, he was engaged in setting a heavy stone which had just been placed in position on the pit wall by means of the boom and cable of a stationary derrick. The boom was operated by a cable passing round a drum, and when elevated could be placed in any desired position by means of a dog placed by the hoistman in a ratchet passing round one end of the drum. When it was necessary to lower the boom the dog was removed

in the same way. If the dog was removed, the boom, which was a heavy piece of timber some 50 or 60 feet long, would fall at once by its own weight, unless the unwinding of the cable was restrained or regulated by the action of the workman in applying the power. The dog consisted of a flat piece of iron, 2 or 3 feet in length, at one end of which was the tooth which fitted into the cog or ratchet. The other end was fastened between two uprights or logs by a bolt, on which it was moved as on a pivot, the logs being part of and rising from an iron casting or base, which was bolted to the frame of the derrick. At the time of the accident the hooks at the end of the cable had been disengaged from the stone, and plaintiff had signalled the hoistman to pull up the cable out of his way. Instead of doing so slowly and with care, he applied the power with such force that the sheave or block of the cable was run up to the end of the boom, striking and jarring it so violently as to slacken the tension of the cable on the drum, and thus release the dog from the ratchet, in consequence of which the boom fell down and injured plaintiff.

This was the explanation of the accident given by the hoistman at the time of its occurrence, and the evidence at the trial pointed in the same direction.

Evidence was, however, also given that the base or plate on which the dog worked was not tightly fastened to the frame of the derrick, or had become somewhat loose on the bolt, so as to admit of some play or twist, the result of which would be that the dog, when released from one ratchet, would slide with the plate to one side and fall down altogether, instead of catching in the next, as it would do if the base were firm, and the lugs in which it worked were, as in that case they would be, in the same plane with the ratchets. The distance between the ratchets was about an inch and a half.

There was evidence that the derrick was one of the most approved kind and of the best modern construction, and, apart from the defect referred to, was in good working order.

The appeal was heard by OSLER, MACLENNAN, and MACLAREN, JJ.A.

W. Cassels, K.C., and F. W. Hill, Niagara Falls, for defendants, appellants.

F. W. Griffiths, Niagara Falls, for plaintiff.

OSLER, J.A.—Plaintiff's case must rest altogether upon secs. 3 (1) and 6 (1) of the Workmen's Compensation Act.

There is no evidence of a state of facts upon which defendants would be liable at common law or under sec. 3 (2) of the Act, the hoistman being a mere fellow-servant of plaintiff, and not a person who had any superintendence intrusted to him, within the meaning of that section and sec. 2 (1).

Plaintiff contends that, though it may have been owing to the negligence of the hoistman that the dog became disengaged from the ratchet, yet the proximate cause of the fall of the boom was the defective condition and arrangement of the plate or base on which the dog worked, but for which the dog would and ought to have fallen into the next ratchet, and thus prevented the fall of the boom. Defendants answer this by saying that the machine was not constructed to meet such a contingency; that, even if in perfect order, this dog would not have fallen into the next ratchet, or if it had done so would not have held the drum, and therefore that the proximate cause of the accident must necessarily be referred to the negligence of the hoistman.

Upon the whole case there was, in my opinion, evidence which could not have been withdrawn from the jury of the defective condition of the base on which the dog was fastened, the consequence of which was that it was liable to slide or move laterally and thus to prevent the dog from falling upon the successive cogs or ratchets of the drum. There was also evidence that this is what the dog would have done had there been no such defect where its movement was not directed by the hand of the operator. If it could have been shewn that, in such circumstances, the dog could not have held the drum, but that either the dog itself or the ratchet must have been broken by the sudden incidence of the weight of the boom, the case would have been within the principle of *Carnahan v. Simpson*, 32 O. R. 328, and the accident could not have been attributed to the defective condition of the dog, since it would have happened even had there been no such defect. The evidence, however, falls short of this, and it was open to the jury to infer that if the dog had fallen into the ratchet the fall of the boom would have been prevented. Then there was evidence that the defect, if the jury found that it existed, had been known to Chown, defendants' inspector of works, and to West, their master mechanic, some time before the accident.

The damages, though large (\$1,250), are not so large as to warrant us in setting aside the verdict and granting a new trial on this ground.

Appeal dismissed with costs.

MACLENNAN, J.A., gave reasons in writing for the same conclusion.

MACLAREN, J.A., concurred.

DECEMBER 16TH, 1904.

C.A.

SPEERS v. GRAND TRUNK R. W. CO.

CRAIG v. GRAND TRUNK R. W. CO.

Railway—Injury to Passenger—Negligence—Action by Person Injured—Subsequent Death—Continuation by Executors—New Action by Executors for Benefit of Widow, Children, and Step-Children—Evidence as to Cause of Death—Damages—Appportionment.

Appeal by defendants from judgment of MACMAHON, J., 3 O. W. R. 69, in favour of plaintiffs.

W. R. Riddell, K.C., and H. E. Rose, for appellants.

A. G. MacKay, K.C., for plaintiffs.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), held that the evidence sustained the findings of the Judge that Speers did receive injuries from the collision of the train in which he was a passenger with another train, and that his death resulted therefrom; that the damages (\$1,000 in the first action and \$5,000 in the second) were not excessive; and were in the second action properly apportioned among the widow, children, and step-children—who were entitled to share.

Appeal dismissed with costs.

DECEMBER 16TH, 1904.

C.A.

VASSAR v. BROWN.

FINN v. BROWN.

Way—Non-repair—Injury to Travellers—Excavation—Want of Guard—Construction of Public Works—Liability of Contractors—Liability of Municipality—Negligence—Dangerous Place—Absence of Warning—Contributory Negligence.

Appeal by defendants Brown and Aylmer from judgment of MERERDITH, C.J., 3 O. W. R. 6, in favour of plaintiff Finn

for \$1,400 damages, and in favour of plaintiff Vassar for \$400 damages.

E. B. Edwards, K.C., for appellants.

A. B. Aylesworth, K.C., for plaintiffs.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.), held that the appellants were bound to take proper precautions to prevent persons from travelling along the old way; that, as there was no fence or barrier at the point of intersection to warn travellers, defendants were liable for the injuries to plaintiffs; that the trial Judge's finding that the injuries to plaintiffs were not caused by their own carelessness or intoxication was supported by the evidence; and that the damages were not excessive.

Appeal dismissed with costs.

DECEMBER 15TH, 1904.

C.A.

CITY OF TORONTO v. GRAND TRUNK R. W. CO.

*Way—Highway—Dedication—Plan—Deed—User — Evidence
Railway.*

Appeal by plaintiffs from judgment of MACMAHON, J., 2 O. W. R. 3, in favour of defendants.

J. S. Fullerton, K.C., for appellants.

W. Cassels, K.C., and W. Gow, for defendants.

The judgment of the Court (OSLER, MACLENNAN, MACLAREN, J.J.A.), was delivered by

MACLENNAN, J.A.—A public street called Cherry street has for a good many years crossed the track of defendants at the south-east front of the city, and, the traffic having become considerable, plaintiffs applied to the Railway Committee of the Privy Council to require defendants to erect gates to protect the public crossing the line. Upon this the question arose, which of the parties should be charged with the expense of providing and maintaining such protection, and the Railway Committee determined that the question should depend on whether the street was a lawful highway when the railway was first constructed across what is now admitted to be a lawful highway, and which was in or about the year 1858. This action was brought to determine that question. . .

The contention of plaintiffs is, that as long ago as the year 1850, if not before, the street at the place in question was dedicated as a highway by the trustees of the Toronto General Hospital, who were then the owners in fee simple of the land, and that from that time the public have used it as such. . . .

[Reference to letters patent from the Crown to the hospital trustees dated 26th April, 1819 (see 10 & 11 Vict. ch. 57), of a large tract of land bounded on the east and south by the river Don.]

The trustees subdivided this land, laying it out in building lots, with streets running generally north and south, and east and west. The most southerly of these was called Front street, and three others came to this street from the north, two of them crossing it and running to the south boundary on the Don, and another, intermediate between the other two, called in the older plans Brook street, and the later plans Cherry street, admittedly coming to Front street. The contention of defendants is that Cherry street never became a public street or highway further south than Front street, or at all events not where it now crosses their track, until after their occupation. . . .

[Reference to 9 Vict. ch. 35, sec. 33; 12 Vict. ch. 35, sec. 42; plan filed in the registry office on 25th January, 1855; plans dated October, 1847, 14th May, 1837, 17th August, 1846.]

The acts or evidence of dedication relied upon by plaintiffs are two conveyances made by the hospital trustees, the one made on 19th and registered on 31st October, 1850, of 3 lots lying to the west of the street in question, to one Jones, and the other made on 14th October and registered on 2nd November, 1853, of the lots on the east side of the same street, to one Jackson; and it is alleged that from and after the making of these deeds, if not before, that part of the street was used as a street by the public, and became in law by dedication a public street or highway. . . .

[Description of the land conveyed to Jones, as described on the plan of lots laid out by the trustees as lots 10, 11, and 12, on the south side of Front street, and (by metes and bounds) as extending "along the water's edge of the river Don in an easterly direction to the eastern limit of lot 12, being the western boundary of allowance for road as described on the plan aforesaid, thence along said boundary north 16 degrees west 7 chains 30 links more or less to the southern boundary of Front street."]

This is an unequivocal declaration by the hospital trustees, the owners in fee of the land, that there was then on the east boundary of lot 12, and adjacent thereto, extending from the river Don to the south side of Front street, a distance of 7 chains 30 links, an allowance for road, as described in the plan of lots laid out by them. No particular plan or copy of plan is specified. The declaration is, that upon the plan of lots laid out by them there is a description of an allowance for road lying along the east side of lot 12. Now at that time, apparently, the original plan was not in existence; it was worn out; but there was one plan, the McDonald plan, which did not unequivocally shew such allowance, while there were two others, the Chewett and the Howard plans, which did so. They were all copies, and I think the proper conclusion from the language of the deed is, that the original plan exhibited the allowance as described therein. This is made, as I think, irresistibly probable by the fact that even the McDonald plan shews a sufficient width for a street and a lot, both of the regulation width. at the east side of lot 12. It is also to be noted that the allowance is declared to extend to the river Don, and not merely to the marsh. . .

[Description in deed to Jackson, with reference to the same plan, of lots 13, 14, 15, 16, 17, 18, and 19, on the south side of Front street, and (by metes and bounds) as commencing at the junction of the southern boundary of Front street and a street running south of lot 13, and extending along Front street south 74 degrees west 10 chains 50 links to the place of beginning.]

By this deed the trustees convey 7 lots described on the plan of lots laid out by them on the south side of Front street, and the description commences at the north-west angle of lot 13. being at the junction of the southern boundary of Front street and a street running south of said lot. There could be no street running south of said lot, for that would be at the Don, but the description refers to a street forming the southern boundary of Front street and running south, and there is no difficulty in construing it as meaning a street running south not "of" but "along" said lot. The width of the 7 lots, 10 chains 50 links, would make each lot 1 chain 50 links, and would leave an allowance for a street west of 13, of the same width as the declared and admitted width of Cherry street on the north side of Front street.

I think this deed, like the deed to Jones, is a declaration that according to the plan there was an allowance for a road on the south side of Front street extending to the river Don

over the site in question. I think that, even if the McDonald plan was shewn to be a true copy of the original plan, reading the plan with the deeds, the latter must be regarded as declaring that a sufficient part of the lot marked on the plan lying east of lot 12 was "allowed," that is, declared to be, for a road, and that such is the meaning of the plan.

I think these two deeds were solemn declarations by the trustees of an intention that the land in question was then an allowance for a road, and, dedication being always a matter of intention, were acts of dedication.

The trustees have never since that done any act to revoke or qualify the declarations contained in these deeds, and it is admitted that the land in question is now, and has been for many years, an undoubted highway, and it is clear that it can only have become so by dedication. The sole question is, whether the dedication had become irrevocable before defendants laid their track across it.

It is in evidence that about the date of Jones's deed he was in occupation and built upon lot 12, and that between that date and 29th December, 1855, the land was conveyed by and to successive owners six different times, besides as many mortgages, in all of which deeds the allowance for road is referred to in the same terms as in the deed to Jones, and on the last mentioned date the then owner conveyed to defendants a strip across 10, 11, and 12, 30 feet wide, lying 441 feet south of Front street "along the west side of Cherry street."

[Reference to other similar deeds.]

It thus appears that all parties interested in the adjacent lands from and after 19th October, 1850, including defendants, in their dealings therewith expressly recognized the existence of the allowance for a road or street extending to the Don, and across what is now the right of way of defendants.

[Reference to the evidence of the use of the street by the public.]

The evidence of Cadieux, Barnes, and Ward is amply sufficient to shew a use by the public of this allowance as a road or street, for several years before defendants laid down their tracks upon it, and that that use, taken in connection with the conveyances made by the trustees of the adjacent properties in 1850 and 1853, established the street as a public street when defendants laid down their tracks.

This conclusion is strengthened very much by the recognition contained in the conveyances obtained by defendants themselves for their line.

The authorities on the subject of dedication all agree that it is a question of intention: see *Glen on Highways*, p. 18 et seq.; *Pratt on Highways*, p. 14 et seq., and the cases there cited; and the notes to *Dovaston v. Payne*, 2 Sm. L. C., 11th ed., p. 170 et seq. In *Poole v. Huskison*, 11 M. & W. at p. 830, Parke, B., says: "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an *animus dedicandi*, of which the user by the public is evidence and no more: and a single act of interruption by the owner is of much more weight." In *Woodyer v. Haddon*, 5 Taunt. 127, Chambre, J., says: "No particular time is necessary for evidence of a dedication; it is not like a grant presumed from length of time; if the act of dedication be unequivocal, it may take place immediately, for instance. if a man builds a double row of houses opening into an ancient street at each end making a street, and sells or lets the houses, that is instantly a highway."

Usually the intention has to be inferred from the acts of the owner and the public use. Here the act or evidence of dedication is unequivocal, it is by deed. From 1850, and probably for some time before, the street was opened and fenced, and used by the public.

Where the intention to dedicate is express, it was held in one case, *North London R. W. Co. v. St. Mary*, 27 L. T. 672. that 18 months' use by the public, after a declaration of intention, made a bridge a public highway. There by deed between a railway company and the New River Co., it was agreed that the railway company should construct a bridge across the railway, by which the river company's water pipes should be carried over the line, which said new bridge "would be devoted to the use of the public." The deed also contained a covenant by the railway company at all times to retain the possession of the bridge and road over the same and the approaches thereto (subject to the user thereof as a road by the public), in their own power and under their own control. After a use of the bridge by the public for 18 months, the railway company closed it, except as to a foot-way. The Court of Queen's Bench, Cockburn, C.J., Blackburn and Miller, JJ., held this bridge to have become a highway. Cockburn, C.J., said: "The free passage of the

public on foot and in carriage continued for 18 months, and this enjoyment (coupled with the declaration of intention) raises the presumption of a dedication to the public, which is not rebutted by anything in the case."

In the present case there is what I think is the clearest evidence of an intention to dedicate, followed from the year 1850 to the present time by enjoyment by the public, without a single circumstance in all that time tending to rebut the presumption, and I think the street became a highway before the year 1856, when the railway company laid down their track across it.

I think the appeal should be allowed and that the judgment should be for the plaintiffs.

DECEMBER 16TH, 1904.

C.A.

KIRK v. CITY OF TORONTO.

Municipal Corporations—Dangerous Machine at Work in Street—Liability for Injuries to Passers-by—Use by Independent Contractors—Neglect to Use Proper Precautions.

Appeals by each of the defendants from judgment of MEREDITH, C.J., after trial without a jury, awarding plaintiff \$1,200 damages. The chief question was whether defendants the corporation of the city should have been held liable to plaintiff for the accident which caused the injuries of which he complained.

The accident arose from a horse, which was being driven by one McBride along Yonge street near the intersection of St. Alban's street, becoming frightened by a steam roller engaged in the work of repairing St. Alban's street, and swerving suddenly upon plaintiff, who was passing on a bicycle.

The work of repair was being done by defendants the Dominion Paving and Construction Company, under a contract with defendants the city corporation. The roller was the property of the city, and was being used by the paving company under a provision in the contract whereby they were to be allowed the use of the roller upon requisition to the city engineer.

The appeals were heard by Moss, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

J. S. Fullerton, K.C., and W. C. Chisholm, for appellants the city corporation.

D. C. Ross and W. H. Irving, for appellants the paving company.

A. J. Russell Snow and C. B. Nasmith, for plaintiff.

Moss, C.J.O.—It was contended on behalf of the city that the terms under which the paving company were accorded the use of the roller amounted to a hiring by the paving company, so as to place its working and control entirely in their hands, and that the city were relieved from responsibility for any negligence while the roller was engaged in the paving company's work. Whether the hiring and user were of such a character as is sought to be ascribed to them by the city, need not be determined, though the recent case of *Waldock v. Winfield*, [1901] 2 K. B. 596, seems opposed to the argument on behalf of the city, for upon another principle the liability of the city seems clear.

The testimony establishes that the roller is a machine calculated to frighten horses of ordinary courage and steadiness, and of this the city's servants and employees were aware.

The work for the purposes of which the use of the roller was committed to the paving company was being done on a public street near to Yonge street, along which there is constant traffic, with horses and vehicles, passing the corner of St. Alban's street. It was shewn that at other times and on other occasions horses had been frightened by and had shied at the roller when in motion, and it must have been obvious to every one who had to do with it that it could not be used where it was being used on the day of the accident, with safety to the traffic on Yonge street, unless some precautions were taken. That this was felt by those in charge is shewn by the fact that the witness Cutbush testifies that it was part of his duty to precede the roller on its trips towards Yonge street and to make some signal, as by holding up his hand, to warn drivers and horsemen on Yonge street of its approach. The evidence fully supports the findings of the learned Chief Justice that proper precautions were not taken on the occasion in question. But it is argued for the city that the work was being done by the paving company as independent contractors, and that it was owing to their negli-

gence that the accident happened. But the work that was being done was being done for the city, and the contract contemplated and necessitated the use of the roller in the performance of the work.

The place where the work was to be done and the means by and the manner in which it was to be performed, made it incumbent on the city, if it had been doing the work otherwise than through a contractor, to see that proper precautions were taken to guard against danger to the public from the use of the roller. That being so, it is clear that the city could not denude itself of this obligation by intrusting the work to a contractor. In *Penny v. Wimbledon Urban District Council*, [1898] 2 Q. B. 212, the rule was stated by Bruce, J., as follows: "When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and if the precautions are not taken he cannot escape liability by seeking to throw the blame on the contractor." The rule thus stated was expressly affirmed by the Court of Appeal when the case was in review before it: [1899] 2 Q. B. 72.

And in *The Snark*, [1900] P. 105, the Court of Appeal again repeated and enforced the same view. In that case A. L. Smith, L.J., after quoting the passage given below, said (p. 110): "I subscribe to every word of this passage as being the law, and in my judgment this present case falls within the decision of *Penny v. Wimbledon Urban District Council* and the reasons of that decision." Here the city placed the performance of the work in the hands of contractors and furnished them with this dangerous machine as part of the means by which it was to be performed. The operation of the machine was likely to be attended with danger to the public. The obligation still rested on the city to see that proper precautions were taken.

If there is any difference between the cases referred to and the case at bar it is not in favour of the city, for under our law there is, if anything, a higher obligation on the part of a municipal body to protect the public in the use of highways than under the law in England.

On behalf of the paving company it was urged that they were not liable because the use of the roller was not unlawful; that they were authorized to do the work and to employ the roller as one of the means by which it was to be per-

formed. But in using the roller they were bound equally with the city to take notice that it was likely to cause danger to the public. And their failure to take proper precautions to prevent the danger occasioned the accident which caused the plaintiff's injuries.

The appeal must be dismissed with costs.

OSLER, J.A., gave reasons in writing for the same conclusion.

MACLENNAN, GARROW, and MACLAREN, J.J.A., concurred.

MEREDITH, C.J.

DECEMBER 17TH, 1904.

WEEKLY COURT.

PIRUNG v. DAWSON.

Judgment—Compromise of Action—Enforcement by Order of Court—Forum—Jurisdiction of Master in Chambers—Practice—Motion to Court.

Appeal by plaintiffs from order of Master in Chambers dismissing application for order allowing plaintiffs to enter judgment against defendant for \$160, the amount which the parties had agreed should be paid by defendant in settlement of the action, together with the costs of the motion. Plaintiffs also made a substantive motion for the order which the Master had refused.

The appeal and motion were heard by MEREDITH, C.J., in Chambers, on 25th November, 1904.

A. R. Clute, for appellants.

L. F. Heyd, K.C., for defendant.

MEREDITH, C.J.—It is, I think, reasonably clear that since the Judicature Act the Court has jurisdiction to enforce in the action a compromise of it to which the parties have agreed: Daniell's Chancery Practice, 7th ed., p. 16; Seton on Judgments, p. 2284; Snow's Annual Practice, 1904, vol. 2, p. 342. and cases cited, especially Alliance Pure White Lead Syndicate Limited v. MacIvor's Patents Limited, 7 Times L. R. 599. . . .

The Master in Chambers was, however, right, I think, in holding that he had no jurisdiction to make the order which he was asked to make; and the proper practice in such cases as this, where the motion is one for judgment, and analogous, therefore, to a motion for judgment on the pleadings, is, in my opinion, to apply to a Judge in Court for such order as may be necessary to enforce the compromise.

Where the compromise is to be carried out by a stay or dismissal of the action, the Master in Chambers may have jurisdiction to make the order; as to this I express no opinion; this is not a case of that kind.

It follows that, in my opinion, plaintiffs fail in their appeal. But I may, I think, treat their substantive motion as having been transferred into and heard by me in Court, and make the order for payment by defendant of the \$160 to plaintiffs forthwith—and that is the order which I make.

No costs to either party of the motion before me or of the proceedings before the Master in Chambers.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING DECEMBER 24TH, 1904.)

VOL. IV. TORONTO, DECEMBER 29, 1904.

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DECEMBER 19TH, 1904.

WEEKLY COURT.

URQUHART v. AIRD.

Security for Costs — Two Defendants — Separate Order for Security — Payment of \$200 into Court to Answer both Orders — Sufficient Compliance with further Order.

Motion by plaintiff to continue interim injunction granted by a local Judge restraining defendants other than John Aird from disposing of chattels and an interest in land which John Aird had transferred to them in trust, being his share of his father's estate.

H. M. Mowat, K.C., for defendants other than John Aird, and Grayson Smith, for defendant John Aird, contended that the motion should not proceed until plaintiff had complied with orders for security for costs.

W. H. Blake, K.C., for plaintiff, contended that, although the two sets of defendants had taken out separate orders for security for costs, the payment of \$200 into Court was a sufficient compliance with both orders, without an order declaring it a sufficient compliance, which was a mere form; referring to *Syracuse Smelting Works v. Stevens*, 2 O. L. R. 141; *Fuller v. Appleton*, 2 O. W. R. 424.

FALCONER RIDGELL, C.J., held that the practice adopted by plaintiff was reasonable and convenient, and the motion should be heard.

DECEMBER 19TH, 1904

DIVISIONAL COURT.

WARD v. LOWTHIAN.

GREEN v. MARR.

Public Health Act—Contagious Disease—Proceedings taken by Local Board of Health to Prevent Spread of Infection—Converting Hotel into Hospital—Action by Owner of Hotel—Illegality—Malice—Reasonable and Probable Cause—Members of Board—Board Sued as a Corporation—Violation of Provision of Act—Conversion of Goods—Confinement of Person in Hospital—Exposure to Infection.

Appeals by plaintiffs from judgment of FALCONBRIDGE, C.J., 3 O. W. R. 362, dismissing these actions.

M. Wilson, K.C., and W. A. F. Campbell, Ridgetown, for plaintiffs.

W. Mills, Ridgetown, for defendants.

The judgment of the Court (MEREDITH, C.J., MACLAREN, J.A., TEETZEL, J.), was delivered by

MEREDITH, C.J.—Ward's action is against the 5 members of the local board of health of the town of Ridgetown individually, F. B. Marr and John Golden, two members of the medical profession who are alleged to have been medical health officers for the town, and against the local board of health as a corporation.

Ward's complaint . . . is against defendants other than Marr and Golden for their neglect to provide a hospital, hospital tent, or other place of reception for the sick and infected upon the happening on 9th February, 1903, of an outbreak of smallpox in the town, and then causing the sick and infected to be confined in his hotel in the town, which, it is alleged, they converted into a smallpox pest-house or isolation hospital, and for 5 days used the hotel for that purpose, and confined the sick and infected in it; that the same defendants neglected to provide any other building or tent in which to place the guests of and boarders at the hotel, and servants and members of Ward's household, who had been exposed to contagion, but kept them in the hotel during the 5 days and for 17 days afterwards, without effectually isolating the sick and infected; and all these acts are alleged to have been done illegally, maliciously, and without reasonable and probable cause. Ward complains as against defendant Marr that during all this time he (Marr), as medical

health officer, remained in the hotel. Ward makes the further complaint against all the defendants that they placed upon the hotel, in the front and rear, placards stating that there was smallpox within the hotel; these acts are also alleged to have been done illegally, maliciously, and without reasonable and probable cause; and Ward complains also that after the persons exposed to contagion who had been kept in the hotel had been released, it was necessary to cleanse and disinfect the hotel, and that the doing of this occupied two weeks, and he claims damages for this as well as the other before mentioned alleged wrongs, and also for the alleged conversion of a quantity of supplies, fuel, and material which were in the hotel, for the value of mattresses, clothing, and other articles belonging to him, which, as he alleges, were destroyed by fire by defendants, and for the value of other bedding and clothing belonging to him, which, as he also alleges, defendants converted to their own use.

I am of opinion that the action of Ward was rightly dismissed.

As regards defendants the local board of health, apart from other insuperable difficulties in the way of Ward's recovering, the action necessarily fails because the board is not a corporation and cannot be sued as such or as a legal entity: *Township of Logan v. Hurlburt*, 23 A. R. 628, 659; *Sellars x. Village of Dutton*, 7 O. L. R. 646, 3 O. W. R. 664; *Kingston v. Salvation Army*, 7 O. L. R. 781, 3 O. W. R. 556.

The substance of the claim against defendants other than Marr and Golden as to the use of the hotel is that they made use of it as a smallpox pest hospital or hospital for 5 days, and after that, for 17 days longer, they used it as a place of confinement for the persons who had been exposed to contagion, and during that time prevented Ward from carrying on his business there.

I am of opinion that this claim failed as well against the board as the individuals who composed it, and this for several reasons.

For the mere neglect of the board, in case of an outbreak of smallpox, to comply with sec. 106 of the Public Health Act, R. S. O. ch. 248, in my opinion no action by Ward lies. I am also of opinion that the proper conclusion on the evidence is that the board was not guilty of any violation of the section, but that the members of it acted with reasonable care and promptness in providing a hospital in which to place the sick and infected, and, so far from having improperly or

As to the alleged conversion also, it was not necessary to prove malice and want of reasonable or probable cause, but this is unimportant, as, in my opinion, as I have said, no conversion was proved.

Ward's appeal should, in my opinion, be dismissed with costs.

The case of the other plaintiffs differs in its facts. The case is that the infant plaintiff Green, though he was not sick or infected, was taken to the temporary hospital, and kept there for several days; that he was afterwards brought from the hospital to and placed in an office building on the premises of his father, and kept there for several days longer; that he contracted smallpox while in the hospital, owing to his being brought into contact with the smallpox patients who were there; and he claims damages for these wrongs. The other plaintiff Green, his father, claims damages for loss of business owing to his house, in which the boy lived with him when he was sent to the hospital, having been placarded with a smallpox card.

This action also was, I think, rightly dismissed. The case failed on the facts. The proper conclusion on the evidence, in my opinion, is, that the boy was suffering from smallpox when he was taken to the hospital; that he went there voluntarily; that he did not contract the disease owing to his having gone to the hospital; and that the house was rightly placarded.

I am also of opinion that, malice and want of reasonable and probable cause not having been shewn, as they were not, plaintiffs Green would not have been entitled to succeed in their action even if defendants had been mistaken as to the boy being sick or infected with smallpox.

In any case the same reason which prevents Ward from recovering against the board of health, as such, is a complete answer to the Greens' claim to recover against the board.

Appeal dismissed with costs.

DECEMBER 19TH, 1904.

DIVISIONAL COURT.

O'REILLY v. THOMPSON.

*Sale of Goods—Action for Price—Combination of Dealers—
Agreement—Construction—Course of Dealing—Company.*

Appeal by defendant from judgment of Judge of County Court of Carleton, in an action upon an account for the price of coal, in favour of plaintiff for \$167.49 with costs.

reception of guests on 2nd March; there was no unreasonable or unnecessary delay in removing the quarantine, and any delay there was after the 2nd March in the opening of the hotel for business was the result of the act of Ward himself, and not of defendants; this is shewn by the testimony of Dr. Marr, to which there is no reason for not giving full credit.

There is no ground for finding that defendants or any of them were guilty of a conversion of any of Ward's property; there was no interference by any of them with the supplies that were in the hotel when it was first placarded, and such of them as were consumed appear to have been used under the direction of Ward's own employees and servants, and indeed partly at all events by members of his own family, and most probably partly by himself.

The claim for the value of the articles destroyed is untenable; they had been exposed to infection, and the board had authority, by sec. 100, to direct the destruction of them, and was not bound to compensate Ward for the loss of them; whether it should do so or not is, by sec. 100, left to the discretion of the board. There was also on this branch of the case evidence sufficient to warrant a finding that what was done was done with the consent of Ward.

The claim for the value of the articles taken to the hospital appears to me a preposterous one. These were blankets and other articles in which the sick persons were wrapped when being taken to the hospital. The sick persons were members of Ward's household, and the blankets and most, if not all, of the other articles had been in use about the bodies of the sick persons while they were at the hotel, and after they had been disinfected Ward was notified that they were ready for him, and he might take them away, but he appears to have chosen not to go or to send for them.

There remains . . . the ground . . . that defendants were not shewn to have acted maliciously and without reasonable and probable cause. I agree with the Chief Justice that this also is a complete answer to most, if not the whole, of Ward's claim. It may be that it would not afford any answer to the claim for using the hotel as a place for the persons who had been exposed to contagion; and it would not, I think, if that were a thing which defendants had no right to do; and if defendants were without any defence to that branch of the claim. I would, for the reasons I have already mentioned, assess Ward's damages at 25 cents and direct judgment to be entered for him against defendants the members of the board for that sum without costs.

Plaintiff and defendant, both being shareholders in the Ottawa Coal Co. and dealers in coal there, must be taken to have understood the principles and rules upon which it was conducted. The only prices actually fixed by the Ottawa Coal Co. from time to time were those at which coal brought to Ottawa should be taken over by the company, and those at which dealers were to sell to consumers.

Defendant went to plaintiff to obtain coal, and plaintiff agreed to let him have it. Plaintiff says that when the price was discussed he told defendant that he did not wish to make anything out of him; that he would charge defendant only what the company charged him, plaintiff, and that, as he could not say what that would be until the company settled the price, he would charge defendant approximate prices in the meantime. Defendant contradicts this and says that plaintiff agreed to sell him the coal at the cost price to himself from the mines, with an added allowance for screenings; that both he and plaintiff knew what the cost price was from the shippers' circulars; that he agreed to pay and plaintiff agreed to sell for that price; and that the Ottawa Coal Co. prices did not enter into the bargain; that the accounts made out from time to time by plaintiff and handed to him, set forth the actual prices at which he bought; that they were subject to no alteration; and that he paid these accounts in full settlement of each delivery referred to in them.

There is, therefore, a clear and direct conflict of testimony between plaintiff and defendant.

I am unable to see how plaintiff can succeed upon the claim he has made, upon the evidence before us. He says the price paid him by defendant is less than that charged him by the Ottawa Coal Co. for the coal he sold defendant, and he claims the difference; but the uncontradicted evidence shewing the manner in which the company dealt, proves that plaintiff was entitled to transfer coal to another dealer without being charged for it any profit to the company, and that this was carried out in settling up accounts between plaintiff and the company at the end of the year. In theory the coal in plaintiff's yard belonged to the company; in practice it was his own; when he sold to a consumer he accounted for the profit to the company; when he sold to a dealer he did not. The profit for which he had to account to the company on sales to consumers was the difference between the two prices, one being that at which the company was supposed to buy from the dealer, and the other being that paid by the consumer to the dealer. The company was supposed to pay the dealer the actual cost price to him of the coal delivered at

Ottawa, and there is no evidence here that the price paid was any greater than the actual cost to him of the coal.

Supposing, therefore, plaintiff's story of the bargain to be the true one, and that he said to defendant . . . "Remember, I will charge you no more than the company charges me," that was equivalent to saying, "I will charge you the price at which the company bought my coal from me," because that was the price charged by the company to him, when he sold to another dealer, upon the final adjustment at the end of the season, no matter what the nominal price might be meantime.

Now, if plaintiff had shewn that he sold his coal to the company at a greater price than it cost him, there would be some shew of reason in his claiming that defendant should pay him the established price between dealers, that is, the price paid by the company to dealers for the coal they brought in. It would not have been unreasonable for plaintiff to have stipulated for that established price when he let defendant have his coal. But the trouble in his way is that the price paid by the company, according to the evidence, was supposed to be the actual cost to the dealer at "circular" rates, and he has not shewn that there was any difference of profit to him between the two rates.

Apart, therefore, from the other evidence . . . plaintiff seems to me to have failed to make out a case. But when we find, as we do here, that plaintiff rendered regular accounts from time to time to defendant for the coal delivered to him, charging in each account a certain price per ton, which was paid him by defendant, and that thereupon he signed receipts for these accounts in full, without a hint upon one of them that any further sum was to be claimed, we have an immensely strong mass of documentary evidence which entirely supports the testimony of defendant. And when we find, further, that no claim was made for the additional sums for which this action is brought and two years had elapsed from the payment of the last account, and that no explanation of the delay is given, the evidence afforded by the oath of defendant and the production of the receipts becomes so strong as to render it unnecessary to consider the testimony of plaintiff, and to reject any other evidence that the price charged in his accounts for coal was not the actual cost of the coal as sold.

Appeal allowed, with costs, and an order for the plaintiff to pay to the defendant the amount of the accounts in a District Court, with interest at the rate of five per cent. for coal delivered by the plaintiff.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., concurred.

DECEMBER 20TH, 1904.

DIVISIONAL COURT.

BURRISS v. PERE MARQUETE R. W. CO.

Railway—Injury to Passenger—Negligence—Overcrowding Train—Proximate Cause—Necessity for Being on Outside Platform.

Appeal by defendants from judgment of ANGLIN, J., in favour of plaintiff, upon the findings of a jury, in an action for damages for injuries sustained by plaintiff owing to the alleged negligence of defendants.

The appeal was heard by BOYD, C., MEREDITH, J., MAGEE, J.

H. E. Rose, for defendants.

P. H. Bartlett, London, for plaintiff.

BOYD, C.—The accident happened on an excursion train engaged by the Irish Protestant Benevolent Society to convey a picnic party from London to Port Stanley by the Pere Marquette system in August, 1903. The train was made up, to the limit fixed for excursions, of 11 passenger coaches, and the evidence appears uncontradicted that these were crowded from London to St. Thomas, and overcrowded from St. Thomas to Port Stanley. Plaintiff's evidence is that he was invited to get on these cars at London, and was unable to find a seat, and was crowded out to the platform. At St. Thomas he was crowded so much that he sat down for better protection on the second step of the outside platform, and while so sitting was thrust out by a swerve of the train, which made the persons standing on the platform press up against him suddenly. This caused him to lose his balance—one of his legs protruded and was struck by some fixture on the track, probably a fence, and he himself would have fallen off, if he had not been grasped by a companion. His companion gives much the same account, and it is corroborated by a third witness, Crawford, as to the dense crowd on the train and the passengers having to stand in the passages and on the platforms.

The American cases cited vary somewhat, but I think the result of their holding is, that where the passenger goes on the platform and rides there as of necessity and not of choice, he is not without right of action for injuries sustained from overcrowding or as the result of overcrowding. In such a conjunction of circumstances, the question of negligence or no negligence is for the jury. The cases are all collected in Am. and Eng. Encyc. of Law, 2nd ed., vol. 5, pp. 678-681. I may refer specially to cases like this of *Chicago v. Fisher*, 141 Ill. 614, and *Marvin v. Manhattan*, 113 N. Y. 659.

We need not expect to find cases of this kind in England, where the method of car construction for railways is different. But the authorities affirm the doctrine here applicable.

[Reference to *Metropolitan R. W. Co. v. Jackson*, 3 App. Cas. 193; *Cobb v. Great Western R. W. Co.*, [1893] 1 Q. B. 465; *Hogan v. South Eastern R. W. Co.*, 28 L. J. N. S. 271.]

There was ample evidence to go to the jury—no objection is made to the charge—and the result in plaintiff's favour ought not to be disturbed.

We disposed during argument of the objection that defendants were not the parties liable for the safe conduct of the excursionists. The contract was made with their chief officer, and to all fair intents with them, and, in the absence of any contradictory evidence, the jury might well find as they did.

Appeal dismissed with costs.

MEREDITH, J., and MAGEE, J., each gave reasons in writing for the same conclusion.

DECEMBER 20TH, 1904.

C.A.

POTVIN v. CANADIAN PACIFIC R. W. CO.

Railway—Injury to Child Playing on Track—Death—Negligence—Excessive Speed in City—Unfenced Track—Findings of Jury—Contributory Negligence of Child—Inference from Facts—Rule 817.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., upon the answers of a jury to questions, in favour of plaintiff for the recovery of \$300 damages.

W. H. Curle, Ottawa, for appellants.

O. E. Culbert, Ottawa, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.), was delivered by

OSLER, J.A.—A branch or line of defendants' railway between the town of Prescott and the city of Ottawa passes through a portion of the city of Ottawa near its easterly limit. The line of the railway enters the city from the south, and in its course crosses Carling avenue, a public highway. Proceeding northward it next crosses Young street, distant about 2,000 feet from Carling avenue. To the east of the line of railway and in the tract between these two highways there is a number of residences, and there are also some streets which abut on but do not cross the line. Along the east side of the line there is a wire fence between Carling avenue and Young street. The first street to the east of the railway and running parallel to it is Preston street, on which is a number of dwelling houses, but the lots on which they stand are not fenced in the rear, so that there is a large open space of common between the rear of the houses on the west side of Preston street and the fence on the east side of the railway. Plaintiff's house is situate on the west side of Preston street about 385 feet south of Young street and 125 feet south of George street, a highway which abuts on but does not cross the railway.

On 23rd May, 1903, plaintiff's son, aged 8 years and 7 months, while engaged in play with some companions of about his own age, went with them through one of the openings in the fence of the railway, and, getting upon the line, was struck and killed by a train coming from Prescott. Plaintiff thereupon brought this action under the Fatal Injuries Act. Besides alleging negligence in the operation and management of the train, plaintiff alleged that the locality through which the train was passing at the time of the accident was a thickly peopled portion of the city of Ottawa, and that defendants' train was allowed to pass through it at a speed exceeding 6 miles an hour, although it was not fenced in manner required by the provisions of the Railway Act. Defendants admitted that the boy was struck by their train, but alleged that he was a trespasser on their private property, and that his death was occasioned by his own negligence and want of reasonable care.

At the trial it was shewn beyond reasonable doubt that for some years before and at the time of the accident the condition of the fence was such that it could not be treated as answering the requirements of sec. 194. of the Railway Act. And, having regard to the locality, unless the track was fenced as prescribed by that section, it was unlawful for

defendants to run their train through the locality in question at a speed greater than 6 miles an hour. As pointed out in *Tabb v. Grand Trunk R. W. Co.*, 8 O. L. R. 203, 3 O. W. R. 885, while there is in sec. 259 of the Railway Act, as enacted by 55 & 56 Vict. ch. 27, sec. 8, no express direction to fence, there is a clear prohibition against maintaining a speed exceeding 6 miles an hour unless the track is fenced as prescribed by the Act.

The engine driver in charge of the locomotive swore that the train was running at the rate of 25 miles an hour, and this was not disputed by defendants. The jury in answer to questions found that the death was due to negligence or breach of duty on the part of defendants, consisting of the poor condition of the fence which permitted the boy to get on the track.

They also found that the death was not due to the boy's own negligence, and that he was not capable of reasonable thought in the matter, and that they could not consider him a trespasser owing to the condition of the fence. They did not make any express finding as to the rate of speed, but, considering that no question was raised as to it, and having regard to the charge, it may properly be inferred that the finding of excessive speed is involved in the finding that the death was due to the condition of the fence. In any case Rule 817, which enables the Court to draw inferences of fact not inconsistent with the findings of the jury, applies, and it is proper to find that the negligence or breach of duty leading to the boy's death was allowing their train to pass through a thickly peopled portion of the city without the track being properly fenced.

Upon such a finding it follows upon what has been said in *Tabb v. Grand Trunk R. W. Co.*, *supra*, that there was a failure properly to protect the public in a thickly peopled portion of the city.

It was for the jury to say, upon the testimony, whether the deceased boy was chargeable with having brought about or contributed to his own death, or whether he had displayed such reasonable care as was to have been expected from him, having regard to his youth and general intelligence.

Upon these questions the jury have found unfavourably to the defence. It was conceded by Mr. Curle that if defendants were liable for the death, there was evidence to sustain the award of damages.

The judgment should be affirmed and the appeal dismissed with costs.

FALCONBRIDGE, C.J.

DECEMBER 21ST, 1904.

WEEKLY COURT.

RE TINNING AND WEBER.

Vendor and Purchaser—Title to Land—Conditional Devise over to Children of a Named Woman—Conveyance by Existing Children—Possibility of Birth of more Children—Presumption from Age of Woman.

Motion by Samuel Weber, purchaser, under the Vendors and Purchasers Act, for an order declaring that the objection to the title of the vendor, Bessie Jane Tinning, that she had not obtained a title in fee simple to the lands in question under the will of her mother, Charlotte Hornibrooke, and conveyance to her of the interests of John B. Tinning, Charlotte W., J. R. H. W., R. L. W., and Mabel W., had not been satisfactorily answered by the vendor, and that it was a valid objection to the title.

By the will of Charlotte Hornibrooke, the land in question was devised to the husband of the testatrix for life, and then to a daughter (the vendor), for life, with remainder to that daughter's son John B. Tinning, in fee, subject to a devise over to the children of Mary L. W. in the event of John B. Tinning dying without issue. The husband of the testatrix was dead. John B. Tinning had had issue, and he and the existing children of Mary L. W. had conveyed to the vendor. Mary L. W. was a widow, 54 years of age, and her children were all of full age.

J. T. Richardson, for purchaser.

N. F. Davidson, for vendor.

FALCONBRIDGE, C.J.—The interests of the existing children (all being of age) of Mary L. W. have been conveyed to the vendor, and the only question is whether the Court ought to act on the presumption that there will be no further issue of her body. There is no medical evidence nor any statement of her physical condition.

She was born on 7th August, 1850, and there was an interval of several years between the birth of her last child and the death of her husband.

Under these circumstances, it is clear on the authorities that the vendor is entitled to judgment. In *Browne v. Warnock*, 7 L. R. Ir. 3, the title was forced on an unwilling purchaser, and that decision is approved of in *Dart*, 6th ed., vol. 1, p. 391. Mr. Armour (*Titles*, 3rd ed., p. 144) thinks that as title has been registered upon a presumption of no

further issue under the Land Titles Act (Re G., 21 O. R. 109), it should also be forced on an unwilling purchaser. In *Edwards v. Tuck*, 23 Beav. 268, the earlier cases are collected. In *In re Widdow's Trusts*, L. R. 11 Eq. 408, In *re Millner's Estate*, L. R. 14 Eq. 245, *Davidson v. Kimpton*, 18 Ch. D. 213, the presumption was acted on. In *Re G.*, supra, there was medical evidence, but Dart says the vendee is entitled only to a moral and not a mathematical certainty of title, and I do not think such evidence is necessary in this case.

MAGEE, J.

DECEMBER 22ND, 1904.

CHAMBERS.

RE REDPATH MOTOR VEHICLE CO.

Company — Winding-up — Petition — Affidavits — Insufficient Facts—Leave to Supplement.

Petition for order winding up the company under the Dominion Act. The petition alleged insolvency generally and also gave certain details, but the application was based on clauses (b), (d), (e), and (g) of sec. 5 of the Act. The subscribed capital was \$16,500, with \$14,300 alleged to be paid up, and the company continued active business only for about 6 months. The assets had dwindled to a comparatively small amount apparently, while two directors were alleged to be liable on unpaid stock.

W. C. McKay, for the petitioner.

W. Davidson, for the company.

MAGEE, J.—The facts given in the affidavits do not make out clearly that the company is brought under the clauses mentioned, and on some important points the affidavits do not comply with the Rules as to giving the source of information and belief. No idea is given as to the outstanding liabilities, and it is not ascertained whether they exceed the remaining assets. Sufficient is shewn to make it desirable that the company should be wound up. It was alleged that the petitioner was unable to procure the examination of the secretary, who is absent. Petitioner should have leave to amend the petition and offer such additional evidence as he may be advised, and again present it within 3 weeks, excluding vacation. Costs of this application can then be disposed of. If not again presented, the petition will be dismissed without costs.

FALCONBRIDGE, C.J.

DECEMBER 23RD, 1904.

WEEKLY COURT.

ATTORNEY-GENERAL FOR ONTARIO v. LEE.

*Revenue—Succession Duty—"Aggregate Value" of Property—
Meaning of—R. S. O. 1897 ch. 24, secs. 2, 3—1 Edw. VII.
ch. 8, sec. 3 (O.)*

Action to recover succession duty upon the estate of Walter S. Lee, deceased.

Upon the pleadings a question of law was raised as to the construction of the Succession Duty Act and amendments.

The will of the deceased gave all his property to defendants in trust for the benefit of his wife and children, and in certain events of his grandchildren.

The defendants submitted that upon the true construction of the Acts the "aggregate value" of the property of the testator was less than \$100,000.

By sec. 3 of the principal Act, R. S. O. 1897 ch. 24, the Act shall not apply (3) to property passing under a will "to or for the use of the father, mother, husband, wife, child, grandchild . . . of the deceased, where the aggregate value of the property of the deceased does not exceed \$100,000 in value."

By sec. 2, the word "property" includes real and personal property of every description, and every estate or interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives.

By the Succession Duty Amendment Act, 1901, 1 Edw. VII. ch. 8, sec. 3, the 2nd section of the principal Act was amended by adding thereto certain sub-sections, the first of which is as follows: (2) The phrase "aggregate value" means the value of the property before any debts or other allowances or exemptions are deducted therefrom.

The question raised was as to the meaning of the words "aggregate value," where the property owned by the deceased was incumbered.

Frank Ford, for plaintiff.

W. R. Riddell, K.C., for defendants.

FALCONBRIDGE, C.J., held that upon the true construction of the above statutory provisions, and having regard to the other provisions of the Acts, the "aggregate value" meant the value of the property, and not merely the value of the deceased's equity of redemption therein.

IDINGTON, J.

DECEMBER 23RD, 1904.

TRIAL.

THOMAS v. TOWNSHIP OF NORTH NORWICH.

Way—Non-repair—Injury to Person—Proximate Cause—Repair of Road—Obstacle—Warning—Liability.

Action by William H. Thomas, an infant, by George H. Thomas, his father and next friend, against a township corporation to recover damages for injuries sustained by plaintiff owing to the alleged negligence of defendants in not keeping a highway in repair.

S. G. McKay, Woodstock, for plaintiff, relied upon *Rowan v. Toronto R. W. Co.*, 29 S. C. R. 717; *Sherwood v. City of Hamilton*, 37 U. C. R. 410; *Ferguson v. Township of Southwold*, 27 O. R. 66; *Am. and Eng. Encyc. of Law*, 2nd ed., vol. 15, pp. 467, 474; *Thomson v. Ridgeway*, 7 Pick. 188; *Connell v. Town of Prescott*, 22 S. C. R. 147; *Homewood v. City of Hamilton*, 1 O. L. R. 266; *Toms v. Corporation of Whitby*, 35 U. C. R. 195.

J. P. Mabee, K.C., for defendants, cited *Atkinson v. City of Chatham*, 26 A. R. 521; S. C., sub nom. *Bell Telephone Co. v. City of Chatham*, 31 S. C. R. 61; *Foley v. Township of Flamborough*, 26 A. R. 42; *Castor v. Township of Uxbridge*, 39 U. C. R. 113.

IDINGTON, J.—Defendants were at the time of the accident in question admittedly responsible for keeping in repair the highway whereon plaintiff, with his father, was travelling when he received the injuries complained of.

Defendants' council, by their committee, on 29th April, 1904, inspected a culvert on this highway, and, finding it in such a condition as to be dangerous, if further used, determined to let a contract for its re-construction, and meantime to close it by a barrier erected to prevent travellers using it.

Steps were taken within a reasonable time to have the work done. When the contract was let, the committee in charge of the work directed the contractor to place a stick of timber across the travelled part of the highway for the purpose of turning the travel off that to a side road that led alongside it, and crossed the little stream on the east side of the place where the culvert had been and was to be reconstructed. This stick of timber was 10 by 12 inches in thickness and 24 feet long. It was placed obliquely across the road.

The actual travelled roadway had been formed by an embankment that raised it above the road allowance on both sides. This elevation began at the hill down which plaintiff came, and increased gradually in its height above the adjacent road allowance till it reached the culvert, where it was 7 feet 2 inches above the level of the water in the stream. At a distance of 65 feet from the culvert it was 3 feet 8 inches in height, and that I find to be the point at or about which the accident took place. . . . It is not possible, from the evidence, to be mathematically correct. A few but only a few feet either way from this point, 65 feet from the culvert, I have no doubt, and so find, was the point where plaintiff's father turned aside.

Defendants' engineer made a measurement and gave in evidence a cross-section of this embankment at the point where he was, as I think erroneously, shewn, shortly before the trial, that the stick of timber had been placed. That point was 94 feet from the culvert, and the grade given there to be passed over in turning off from the travelled road shews a gradual slope. I infer as a fact that this gradual slope obtained all the way along the side, in question, of this embankment, and that with such a slope the 3 feet 8 inches in height could, if attempted slowly and with care, have been descended from the travelled road to the temporary side road without serious results. This descent could not, however, have been made in safety travelling down it at "a nice trot."

I find that the stick of timber was thrown across the road at this point, and that the travelled part of the road there was 18 feet wide. The stick, being 24 feet long, was placed obliquely for the purpose of preventing the ends extending over the edge of the embankment. . . .

Defendants were discharging their duty in clearing this part of the highway, and I find that the divergent side road intended for temporary use was sufficient for that purpose. It was an old beaten path that was, to any one keeping a look-out, plainly discernible. The obstruction that was furnished by the stick of timber was, in daylight, quite sufficient to turn aside safely all careful travellers going at a moderate rate of speed. It was quite inadequate for such a purpose at night, and defendants for that reason ought not to have relied upon it.

Now, what happened to plaintiff, who was an infant about 3 years of age, is told by his father. The father, having this boy with him, drove in a light waggon, to which was attached a pair of shafts and a whiffletree that appeared, when starting, to be in good order, though not closely inspected at the part that afterwards gave way. The conveyance was loaded

with 12 bags of potatoes. The father and son were sitting upon a spring seat thereon, and the father says they were going along at a "nice trot." They came to a hill that he guessed was about 10 or 12 feet high, but actual measurement shews twice that height, and rather steep for a bit. This hill sloped down towards the culvert in question, and, as they were making the descent, the fastening attached to the right end of the whiffletree, to which the trace was hooked, came off, and the horse started up at a greater rate of speed and pulled the keepers of the harness over the ends of the shafts, so that they dropped to within about a foot of the ground. The only things that then held the shafts up at all were the hold-back straps buckled to the breaching. This so disturbed the mind of the father, who was driving, that he did not observe, till just up to it, the stick of timber already referred to, and then, thinking it a sign of danger ahead, drew the horse suddenly by the left rein, and he turned, when thus drawn aside, and went over the embankment I have spoken of, before quite reaching the timber. The result was the upsetting of the waggon, the escape of the horse, and the injury to plaintiff.

I am unable to find that this accident, which took place on 7th June last about 1 o'clock in the afternoon, when a prudent driver could easily have seen the obstruction in his way, and the side road that shewed a beaten path where travellers for over a month before had been going in safety, and he should have gone, was the natural result of anything defendants had improperly done or neglected to have done.

It was caused, I find, proximately by the unfortunate condition of the harness and its attachments, and the latter coming loose when descending the hill and so disturbing horse and man that the horse was not guided as he otherwise would have been either at the spot in question, or a few steps back, into the divergent road he should have taken.

The cases cited in support of plaintiff's claim are either clearly not cited in point or distinguishable from this.

I have not found any case exactly like this. Bell Telephone Co. v. City of Chatham, 31 S. C. R. 60, is in many respects like it, yet not exactly it. The principle upon which the Court acted is, however, exactly that which I desire to apply here, and so applied, the plaintiff cannot recover. The American cases to which I was referred by the Am. and Eng. Encyc., pp. 467 and 474, citation, are rather against than for plaintiff.

The case of Anderson v. Sath, 42 Maine 346, which was upon a statute similar in terms to our Municipal Act, imposing upon the municipal authorities the absolute duty to

repair and keep in repair the public highway, is, if good law here, conclusively against plaintiff. See also *Little v. Brockton*, 123 Mass. 511. The fact that defendants in doing what they did were acting in the line of their duty, distinguishes this from many cases referred to or that might profitably be looked at under slightly different facts.

The reasoning of the Chancellor in the case of *Minns v. Village of Omemee*, 2 O. L. R. at p. 581, as far as it goes, applies to this phase of the case in hand.

It may be, however, said that defendants in neglecting when about the business to erect an adequate barrier that was suitable for all possible emergencies, failed to become entitled to claim that they acted within the law.

It does not so strike me, and if this barrier had been four or five feet high, and thus probably complete for all reasonable requirements, I do not think it would have served to help plaintiff under the circumstances he was placed in.

It was urged that there should have been a warning put up along the road. That might have been a praiseworthy thing to do, but I cannot find in any place law binding them to adopt that particular course. It would not have helped the stranger in the dark.

It was also urged that there should have been a railing along the embankment in question. It would hardly do to lay it down that every bank 3 feet 8 inches high, sloping gently down, must be protected by a railing.

The case may go further, and should my finding on the law and facts be reversed, I assess provisionally the damages plaintiff would be entitled to at \$400. . . .

I think defendants' failure to complete a proper barrier serviceable for all purposes and at all times by night and by day invited litigation such as this. I therefore refuse them costs. . . .

Action dismissed without costs.

THE ONTARIO WEEKLY REPORTER

(TO AND INCLUDING DECEMBER 31ST, 1904.)

VOL. IV. TORONTO, JANUARY 5, 1905.

No. 19

MACMAHON, J.

JULY 3RD, 1899.

TRIAL.

WILSON v. LINCOLN PAPER MILLS CO.

Master and Servant—Injury to Servant—Cause of Accident—Evidence—Negligence.

Action by John Wilson, as administrator of the estate of John Wilson the younger, to recover damages for the death of the latter from injuries received by him while in the employment of defendants at Merritton, owing, as alleged, to the unsafe and defective condition of a hoist in defendants' mill.

The jury found that the deceased came to his death through a defective elevator; that there was negligence of defendants in not having a guard and not having sufficient light; that the deceased was not guilty of any act which contributed to his death; and assessed plaintiff's damages at \$700.

There was evidence that the approach to the hoist shaft was unguarded, and that the hoist was defectively constructed in that it had no catch.

G. Lynch-Staunton, Hamilton, and J. H. Ingersoll, St. Catharines, for plaintiff.

B. B. Osler, Q.C., for defendants.

MACMAHON, J., held that defendants were liable, notwithstanding that there was no direct evidence of how the deceased was injured. *Kerwin v. Canadian Coloured Cotton Mills Co.*, 28 O. R. 73, 25 A. R. 36, 29 S. C. R. 478, distinguished. *Groves v. Wimborne*, [1898] 2 Q. B. 402, followed.

MAY 25TH, 1904.

DIVISIONAL COURT.

GALLINGER v. TORONTO R. W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Contributory Negligence—Nonsuit.

Motion by plaintiff to set aside nonsuit entered by FERGUSON, J., in an action for damages for personal injuries received by plaintiff by being struck by a car of defendants.

Plaintiff, in returning home at two o'clock in the morning, alighted from a west-bound car on the north track of a street in the city of Toronto, and proceeded to cross the north and south tracks in front of an approaching east-bound car on the south track, then about one hundred feet away. He was struck by the car and injured. There was evidence that it was going at the rate of eight to ten miles an hour; that there was a bright electric light near by; that plaintiff, if careful, could have seen the approaching car; but that the motor man did not apply the brakes or sound the gong before plaintiff was struck.

B. N. Davis, for plaintiff.

James W. Bain, for defendants.

THE COURT (MEREDITH, C.J., STREET, J., ANGLIN, J.), held that the nonsuit was properly directed, and dismissed the motion with costs.

FALCONBRIDGE, C.J.

DECEMBER 22ND, 1904.

CHAMBERS.

RE THOM v. McQUITTY.

Division Court—Jurisdiction—Amount over \$100—Ascertainment—Necessity for Extrinsic Evidence—4 Edw. VII. ch. 12. sec. 1 (O.)—Application to Pending Action—Prohibition.

Motion by defendant for prohibition to the 2nd Division Court in the county of Lambton, upon the ground that the Court had no jurisdiction, because the amount in question was over \$100 and was not ascertained by the signature of defendant.

J. Hales, for defendant.

C. A. Moss, for plaintiff.

FALCONBRIDGE, C.J.—In view of the conflicting decisions as to the principle of construction of the word “ascertained” in the Division Courts Act, the amending provision contained in 4 Edw. VII. ch. 12, sec. 1, must be regarded as being in its nature a declaratory enactment, and it must not, therefore, be treated as inapplicable because these proceedings were launched in the Division Court before the Act was passed: Maxwell on Statutes, 3rd ed., pp. 308, 309, 313. Here other and extrinsic evidence beyond the mere production of the document and the proof of the signature to it, would have to be given to establish the claim of plaintiff; and the statute applies to oust the jurisdiction. The conflicting authorities are collected in Kreutziger v. Brox, 32 O. R. 418, and in Bicknell & Seager’s Division Courts Act, 2nd ed., p. 86 et seq.

Order made for prohibition without costs.

IDINGTON, J.

DECEMBER 23RD, 1904.

TRIAL.

COOKE v. McMILLAN.

Vendor and Purchaser—Contract for Sale and Purchase of Land—Specific Performance—Objection of Purchaser—Jurisdiction of Court over Foreign Defendant—Title—Will—Conveyance by Executors—Period of Distribution.

Action for specific performance of a contract.

J. G. Wallace, Woodstock, for plaintiff.

J. H. Rodd, Windsor, for defendant.

IDINGTON, J.—Plaintiff agreed to sell and defendant to buy the lands in question. Defendant resides in Detroit. The bargain was made in the county of Oxford in this Province, and the agreement executed there.

Defendant’s counsel asked leave to amend his statement of defence and plead that this Court had no jurisdiction to direct specific performance against a purchaser residing in and a naturalized citizen of a foreign country, or at all events would as a matter of discretion not direct judgment in such case.

No authority was cited for such a proposition but Smith v. Hunt, 2 O. L. R. 134, 4 O. L. R. 653, 1 O. W. R. 598, which does not support it. I refused to amend as asked. If there ever has been any difficulty of the kind in the way of plaintiff’s recovery herein, defendant is rather late, after pleading and coming down to trial, to try to set it up.

Defendant sought also to escape from his own agreement by suggesting that it was that of his wife, under such facts known to plaintiff as to disentitle him to succeed here. In this his evidence failed to make out what he seemed to desire to contend for.

The point chiefly relied upon by the defence was that plaintiff claimed title through the executors of the will of his father, and that by the will the title in question was vested in the executors as trustees, subject to such trusts as made it impossible for them lawfully to convey the land in question to plaintiff, as they did by the deed of 20th March, 1888, to plaintiff.

It was insisted that the testator by this will intended that the trustees should sell, and only after sale divide the proceeds, and that such division must be postponed so as to cover a period of time longer than had transpired before this conveyance was made.

The trust is quite clear, I think.

The trustees were given a discretion to retain the fund in their own hands "for an indefinite period," but permitted to pay over as and when they saw fit. And they having satisfied themselves that the time for division had come, I see no necessity for their going through the form of selling and realizing before making the division. It is the case of the beneficiaries in a simple trust being entitled, when the time for distribution has come, to have the legal estate vested in them or conveyed as they direct. Here the two beneficiaries agreed upon the division that was, as to plaintiff's share, carried out by the execution of the deed already mentioned. When the trustees determined that the time had come for this division, they had no right to sell against the will of the beneficiaries, who were entitled to take the estate without conversion if they saw fit. . . .

It is pointed out that there is a gift over, but this is only in the event of all the direct beneficiaries dying without issue before the time for distribution. It cannot affect the matter now.

I assume that all the facts are admitted that would entitle the trustees to deal with the estate and divide it, when they made the conveyance upon which plaintiff's title rests.

I think plaintiff entitled to the usual judgment for specific performance, and if there are any further questions as to the title needing investigation, let the usual reference be made in respect thereof, but with the declaration that plain-

tiff is entitled to claim under and by virtue of the conveyance of the trustees, if title otherwise good.

Judgment will be for plaintiff with costs.

See Underhill on Trusts, 4th ed., ch. 5.

MACMAHON, J.

DECEMBER 24TH, 1904.

CHAMBERS.

DOULL v. DOELLE.

Arrest — Judgment against Married Woman — Proprietary Liability—Form of Order—Intent to Quit Ontario.

Motion by defendant to set aside an order under R. S. O. 1897 ch. 80, sec. 1, for the arrest of defendant, against whom a judgment was recovered by plaintiffs on 11th April, 1899, which directed that "plaintiffs recover against defendant (a married woman) \$1,310.51, payable out of her separate estate, with the costs of this action and motion to be taxed."

Defendant had paid nothing on account of the judgment, and since the recovery of the judgment and within the past year, the defendant's husband died, so that she was a widow.

W. E. Middleton, for defendant.

F. J. Roche, for plaintiffs.

MACMAHON, J.—Even had defendant not been a married woman, plaintiff's claim being in judgment, an order for arrest should not have been made under sec. 1.

This motion, however, can be disposed of upon the ground that the judgment being against a married woman and limited by its terms to payment out of her separate estate, it is a proprietary liability and not a personal one; and in *Scott v. Morley*, 20 Q. B. D. 120, it was held that since the passing of the Married Women's Property Act in 1882 in England, enabling a married woman to enter into contracts independently of her husband, for which she would be liable in respect of her separate property, a judgment recovered against her is merely a proprietary judgment, and she cannot be arrested under the Debtors Act.

The fact of defendant having become a widow since the recovery of the judgment does not alter the effect of it so as to convert it into a personal judgment against her. And even had the judgment been recovered against her as a widow on a contract entered into by her during coverture, it could only be in the form settled by the Court of Appeal in

Scott v. Morley, 20 Q. B. D. 120, in an action against a married woman, with such verbal alterations as are necessary to adapt that form to a judgment against a widow: Softlaw v. Welch, [1899] 2 Q. B. 419.

It is not, in the view I have expressed, essential that I should discuss the other ground urged. But I may say that it was not shewn that there was good and probable cause for believing that defendant was about to quit Ontario with intent to defraud her creditors. She is keeping a boarding-house in London, and on her examination as a judgment debtor she said that her brother, a physician in Pontiac, Michigan (to whom she had sent \$3,000, proceeds of insurance on her husband's life), had offered her a home, but she did not state whether she intended to accept his offer or not.

The order for the arrest of defendant must be set aside with costs.

The sheriff will be protected.

DECEMBER 27TH, 1904.

DIVISIONAL COURT.

SMITH v. NIAGARA, ST. CATHARINES, AND TORONTO R. W. CO.

*Railway—Injury to Animal Crossing Track—Way—Highway
—Negligence — Neglect to Give Warning — Contributory
Negligence—Findings of Judge—Appeal.*

Appeal by defendants from judgment of Judge of County Court of Lincoln in favour of plaintiff for \$175 and costs. A servant of plaintiff was driving plaintiff's horse and waggon along a narrow way which led across a track of defendants in the village of Merritton. The way was arched over, and the view on both sides was obstructed by buildings and other obstacles which hemmed in the way on both sides until within a distance of 3 feet 6 inches of the track of defendants. The waggon was piled high with empty tin cans, and, the way being uneven, the servant was occupied as he passed under the archway in holding the cans on his waggon to prevent their falling off. As he emerged from the archway, travelling at a walk, the horse was struck by an engine of defendants, in charge of 4 men, which had just shunted some cars to a line house near the spot, and was returning at a rate of 2 to 4 miles an hour past the archway. The horse was forced against the sides of the archway and injured, and this action was brought to recover damages for the injuries.

Plaintiff's servant was not looking out for an engine or train; the persons on the engine had whistled and sounded the bell a short time before the collision, but had not done so for a time which they variously estimated at from a minute and a half to 4 minutes before the collision. The siding was used by defendants only two or three times a week. The way was used by the public constantly, and a sidewalk was built upon it. The Judge below found that the way was a public highway; that defendants had been guilty of negligence in not taking proper precautions; and that plaintiff's servant had not been guilty of contributory negligence: and he assessed the damages at \$175.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

W. H. Blake, K.C., for defendants.

A. W. Marquis, St. Catharines, for plaintiff.

STREET, J.—The evidence seems to establish that the road or way upon which plaintiff's servant was driving his horse at the time of the accident was a "highway" within the meaning of sec. 3 (g) of the Railway Act of 1888.

The point at which this highway emerges from the archway and strikes the siding, is so close to the rails, and the view of the track on each side is so completely obstructed until the traveller approaching it has almost put his foot on the nearest rail, that the crossing is an unusually dangerous one. The question then arises whether defendants took reasonable and proper precautions to guard against accidents, considering the dangerous character of the place in question. It is admitted that the precautions of ringing the engine bell and blowing the whistle, required by sec. 256 of the Railway Act of 1888, were not taken; but defendants dispute the application of that section to the case of an engine shunting cars in the railway yard, as this one was doing. I do not think it is necessary to determine that question here. The cases seem to have established that, apart from that section and in cases in which it is not applicable, a duty is cast upon the defendants to take reasonable precautions at dangerous points for the avoidance of accidents. Here there seems to have been an entire absence of any precaution. The engine left the point at which it had discharged its cars, that point being from 90 to 100 feet away, and proceeded slowly along and past the highway in question without giving any warning whatever of its approach. In my opinion there was therefore evidence

from which the learned Judge in the County Court was justified in finding that defendants had been guilty of negligence: *Hollinger v. Canadian Pacific R. W. Co.*, 20 A. R. 244, 251, 252; *Grand Trunk R. W. Co. v. McKay*, 34 S. C. R. 81, 101; *Lake Erie and Detroit River R. W. Co. v. Barclay*, 30 S. C. R. 360; *Bonnville v. Grand Trunk R. W. Co.*, 1 O. W. R. 304; *Moyer v. Grand Trunk R. W. Co.*, 2 O. W. R. 83.

Defendants, however, insist that the action should have been dismissed upon the evidence of the servant in charge of the horse. It is asserted that he blindly walked into the danger which lay in front of him without the ordinary precaution of looking or listening. In determining the weight and effect to be given to this contention the surrounding circumstances must be considered. The place was one which was traversed by an engine only two or three times a week; the approach to the track was an ascent and was so uneven that the horse was driven at a walk, and the driver was engaged in holding his load on the waggon as he approached the track. Approaching so slowly as he did he may well have expected to receive warning of the approach of an engine, and to have been able easily to draw up before it reached the crossing. I think the question of contributory negligence under these circumstances was one which could not properly have been withdrawn from a jury, and that the learned Judge who tried the case might not unjustly come to the conclusion that the driver had not been guilty of negligence which contributed to the accident.

I cannot therefore see my way to interfering with the judgment, and in my opinion the appeal should be dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., concurred.

FALCONBRIDGE, C.J.

DECEMBER 28TH, 1904.

CHAMBERS.

WILLIAMSON v. MERRILL.

Discovery — Examination of Party — Disclosing Names of Witnesses—Modified Rule—Relevant Fact.

Appeal by plaintiff and cross-appeal by defendant in action for libel from order of Master in Chambers refusing

to order defendant to answer certain questions on examination for discovery, but ordering defendant to answer one question.

A. E. O'Meara, for plaintiff.

G. M. Clark, for defendant.

FALCONBRIDGE, C.J.—The learned Master seems to me to have been entirely right except as to one point, viz., as to the refusal (questions 217 ad fin.) to give the names of the two men to whom (besides defendant) plaintiff is charged with having “allowed familiarity.”

The point involved here is extremely fine, impinging apparently on the general rule against disclosure of the names of witnesses.

The modified rule is to be gathered from the judgments of Lord Esher, M.R., and of Bowen, L.J., in *Marriott v. Chamberlain*, 17 Q. B. D. 154, at pp. 163, 164, 165, and it is, that, although one party cannot compel the other to disclose the names of his witnesses as such, yet, if the name of a person is a relevant fact in the case, the right that would otherwise exist as to information with regard to such fact is not displaced by the assertion that such information involves the disclosure of the name of a witness. And Lord Esher thought that it did not signify in dealing with these questions on whom it lies to prove the facts with regard to which the interrogatory is put.

I venture to think that the condition of affairs here is such as to make the above canon entirely applicable.

The other cases along the same line are: *Storey v. Lord George Lennox*, 1 Keen 341; *Humphries v. Taylor Drug Co.*, 39 Ch. D. 693 (a case for infringement of trade mark); *Kuhliger v. Bailey*, W. N. 1881, p. 165; *Dalgleish v. Lowther*, [1899] 2 Q. B. 590; *Attorney-General v. Gaskill*, 20 Ch. D. 519.

Eade v. Jacobs, 3 Ex. D. 335, is distinguished in *Marriott v. Chamberlain*, and is also said by the learned Judge who decided it (Cotton, L.J.), to have been “somewhat misunderstood” (*Attorney-General v. Gaskill*, at p. 529.)

As to this ground the appeal will be allowed, and the defendant ordered to appear for further examination at his own expense.

Otherwise the order is affirmed. Costs of this appeal and cross-appeal to be costs in the cause.

DECEMBER 28TH, 1904.

DIVISIONAL COURT.

HAMMOND v. GRAND TRUNK R. W. CO.

Master and Servant—Injury to Third Person by Negligence of Servant—Scope of Employment—Railway—Watchman.

Action by George Hammond, an infant under the age of 21 years, by Elizabeth Hammond, widow, his next friend, and the said Elizabeth Hammond, against the Grand Trunk R. W. Co. and Horace Jarman, to recover damages for an injury sustained by the infant plaintiff at the hands of the defendant Jarman under the following circumstances.

The line of the Grand Trunk R. W. Co. crossed Queen street at the western outskirts of the city of Toronto; and bars crossing the highway, two or three feet above the level of the highway, were lowered when a train was approaching, so as to prevent traffic from proceeding along the highway crossing until the train had passed, when they were raised.

The defendant Jarman was the watchman employed by the company at the crossing, and his duty was to raise and lower the bars by means of a lever at the watchman's house or shelter close to the crossing. At the point in question the railway tracks ran east and west, and the watchman's lever was on the north side of the track. On 16th July, 1903, the infant plaintiff, who was then about 16 years of age, with two other boys, was coming along Queen street from the south, and found the bars down and a train approaching; they all leaned on the gate and watched the train pass, and as they followed it with their eyes they felt the jar of the bars caused by the effort of the defendant Jarman, the watchman, to raise them. They did not immediately remove their weight from them, and Jarman picked up a cinder and threw it towards them and struck the infant plaintiff in the eye, putting it out.

The action was tried before ANGLIN, J., with a jury, and resulted in a verdict for the infant plaintiff for \$800 against both defendants.

The action was dismissed so far as the claim of Elizabeth Hammond was concerned.

The defendant company appealed from the judgment, and moved in the alternative for a new trial, upon objections taken during the trial and to the charge of the learned Judge, that there was no evidence of liability on the part of the railway

company, the act done by the defendant Jarman being outside the scope of his employment and not authorized by them.

W. R. Riddell, K.C., for defendants the Grand Trunk R. W. Co.

R. C. Clute, K.C., and E. G. Morris, for plaintiffs.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), was delivered by

STREET, J.—Defendant Jarman was employed by defendants the Grand Trunk R. W. Co. to lower the bars across the highway as a train was approaching, and to raise them as soon as it had passed. This duty carried with it that of warning persons who were obstructing the raising or lowering of the bars, and thereby preventing him from using them for the purpose for which they were required. The infant plaintiff was obstructing the raising of the bars, and defendant Jarman threw a cinder at him, or in his direction, and put out his eye. This was an act for which the defendant company might or might not be answerable. If the acts were done out of mere malice and ill-temper and to punish the boy, the company would not be answerable; but if it were done for the purpose of warning him to get off the bars so that they might be raised, then it is clear that they would be answerable, although the act done was a tort: *Bayley v. Manchester R. W. Co.*, L. R. 7 C. P. 415; *Seymour v. Greenwood*, 6 H. & N. 359; *Dyer v. Munday*, [1895] 1 Q. B. 742; *Richards v. West Middlesex*, 15 Q. B. D. 660; *Coll v. Toronto R. W. Co.*, 25 A. R. 55.

This distinction was clearly put before the jury by my brother Anglin in his charge. He said to them: "Now what was the object with which Jarman threw that cinder? If he threw it in a moment of irritation—annoyed at the boys being on the gate—not for the purpose of getting them away so that he could open the gate, but simply to gratify some spiteful feeling of his own against the boys, then it was not an act done in the course of his employment, and the railway company would not be responsible for it. If, on the other hand, his object was not to hit the boy, but to attract his attention and get him away from the gates so that they could be opened, you all probably come to the conclusion that he did it in the course of his employment—the opening of the gate—and if you reach that conclusion, then that makes the employers liable for the act which the servant did."

Upon this charge the jury found for plaintiff, and they must be taken to have found, as they might properly do upon

the evidence, that the act done by Jarman was done in the course of his employment.

In my opinion, the charge and judgment were right, and the present motion should be dismissed with costs.

CARTWRIGHT, MASTER.

DECEMBER 29TH, 1904.

CHAMBERS.

GLOSTER v. TORONTO ELECTRIC LIGHT CO.

Pleading—Statement of Claim—Personal Injuries by Electric Wires—Subsequent Removal of Wires—Admissibility of Evidence.

This action was brought to recover damages for injuries to a boy by touching the wires of defendant company on Glen road bridge. It was alleged that the wires were not properly guarded, and that they were in a dangerous position, which lured unsuspecting children to their certain injury and possible death.

The 9th paragraph of the statement of claim concluded with these words: "After the injury to the plaintiff, the defendants insulated the said wires and removed them further away from the said bridge to prevent a recurrence of injury to other members of the public such as the plaintiff sustained."

The defendants moved to strike out this as being contrary to the Rules.

R. H. Greer, for defendants.

W. N. Ferguson, for plaintiff.

THE MASTER.—I think the motion must succeed, on two grounds:

1st. Because the case of *Cole v. Canadian Pacific R. W. Co.*, 19 P. R. 104, seems exactly in point.

2nd. Because, even if evidence of the facts pleaded is admissible at the trial, it is only evidence. It cannot possibly be one of the material facts which the plaintiff must prove in order to succeed at the trial. Being only evidence at the most, it should not be pleaded. This question is well illustrated by the case of *Blake v. The "Albion."* 35 L. T. 269, where allegations of fact were struck out of the statement of claim, though evidence of them was allowed to be given at the trial. This appears from the report of the same case on motion after the trial, in 4 C. P. D. 94.

Mr. Ferguson contended that such facts could be proved at the trial, and might be pleaded. He relied on *Atchison*

v. McKee, 15 Pac. Rep. at p. 490. This case only gives the law of Kansas, and is in direct conflict with the case of Nalley v. Hartford Carpet Co., 51 Conn. 524, a judgment which will well repay perusal.

He cited with more confidence Willey v. Boston Electric Light Co., 168 Mass. 40. At first sight this seems in point. But on examination it does not support his position. It decided that, as what was done after the accident would, if done before, have prevented the death of the night patrolman, this could be used at the trial to shew that leaving the wires in the first condition was "a defect in the condition of the machinery" within the meaning of the Massachusetts statute. The weight of evidence of this fact would consist not in its having been done after the accident, but in its not having been done before. Even then, it would still only be evidence, and even under Millington v. Loring, 6 Q. B. D. 190, I do not think that it could properly be pleaded. It is only evidence of actionable negligence. It is the negligence which is the cause of the accident as alleged, and it is that which plaintiff must prove.

The motion is allowed with costs to defendants in any event.

TEETZEL, J.

DECEMBER 29TH, 1904.

CHAMBERS.

RE HARKNESS.

Insurance—Life—Certificate of Benefit Society—Disposition of Proceeds by Will—Identification of Certificate—Residuary Estate—"Including."

Motion by executor under Rule 938 for order determining a question arising under the will of Adam Harkness as to the disposition of life insurance moneys.

The testator was the holder of a policy of insurance issued by the Ancient Order of United Workmen, payable to "his order or heirs."

After devising certain real estate, the will contained the following clause: "(2) I give the residue of my property, including life insurance, to my wife Harriet Elizabeth, and to my two youngest children, Adam Weir and Andrew Edmund, share and share alike, it being understood that my wife accepts this in lieu of dower," etc.

Excluding the insurance money, the estate was not sufficient to pay the testator's debts, and the question was whether

the insurance money was available for creditors or went to the widow and two children.

A. R. Clute, for executor.

A. H. Marsh, K.C., for widow.

F. W. Harcourt, for infants.

A. C. McMaster, for creditors.

TEETZEL, J.—The answer to the question depends entirely upon whether the will sufficiently identifies the policy, within the meaning of the Ontario Insurance Act.

Upon this point, the case is, in my opinion, governed by *Re Cheesborough*, 30 O. R. 639. . . .

I think the language of this will, "the residue of my property, including life insurance," although not using the words "policy" or "certificate," makes it as certain and clear as in the *Cheesborough* case what policies or certificates of insurance are meant, namely, any and every policy securing insurance on testator's life in respect to which he had a disposing or an appointing power.

It was argued by Mr. McMaster that the effect of the language used, particularly the word "including," was to make the life insurance a part of the residuary estate, and therefore liable for debts to the exclusion of the beneficiaries named. I think, however, in this connection the word "including" does not mean to declare that the life insurance is a part of his residuary estate, but that it is given in addition to residuary estate.

Jarman on Wills, 5th ed., p. 1090, defining the meaning of the words "namely" and "including," says: "Namely imports interpretation, that is, indicates what is included in the previous term; but 'including' imports addition, that is, indicates something not included;" and the same definition is given in Stroud's Judicial Dictionary under title "namely." See also *Re Duncombe*, 3 O. L. R. 510, 1 O. W. R. 153.

Not being able to distinguish this case from the *Cheesborough* case, the order I make must be that the widow and children are entitled to the insurance moneys to the exclusion of the creditors.

The costs of the creditors out of the general estate; the costs of other parties out of the insurance fund.

ANGLIN, J.

DECEMBER 30TH, 1904.

WEEKLY COURT.

RE WAKEFIELD MICA CO.

Company—Winding-up—Contributories — Subscriptions for Shares—Payment—Transfer of Property—Defective Organization of Company.

The Wakefield Mica Company, incorporated under the Ontario Companies Act, was being wound up in the office of the local Master at Ottawa. He reported that J. S. King and C. A. Johnson sr. were holders of stock in the company to the extent of \$15,000, which, excepting credit given by way of set-off for \$2,515.14, the value of certain chattel property, remained unpaid, and in respect of such stock he placed them upon the list of contributories for \$12,484.86. The Master found C. E. D. Chubbuck and K. B. Holland to be holders of \$25,000 of stock, which, he held, they acquired as fully paid up, in consideration of a transfer to the company of some mica properties.

King and Johnson appealed from the finding that they were contributories; the liquidator appealed from the finding that Chubbuck and Holland were not contributories; and the liquidator also moved for leave to appeal from the finding that King and Johnson were entitled to the set-off of \$2,515.14, allowed them by the Master.

W. N. Tilley, for King and Johnson.

T. A. Beament, Ottawa, for the liquidator.

H. A. Burbidge, Ottawa, for Chubbuck.

ANGLIN, J.—Chubbuck and Holland owned certain mica properties. Johnson, Willats, & Co. owned a stock of mica, some mining machinery, and some agencies. Of the latter firm of C. A. Johnson jr., H. M. Johnson, and one Willats were members, and J. S. King and C. A. Johnson sr. large creditors. A preliminary arrangement was come to between Chubbuck and Holland and Johnson, Willats, & Co., for the formation of a joint stock company to take over their respective properties and businesses. There can be no doubt that it was the design of Johnson, Willats, & Co., immediately upon the formation of the projected company, to transfer whatever stock they should acquire to J. S. King and C. A. Johnson sr., in satisfaction of their claim as creditors of Johnson, Willats, & Co. On 30th May, 1903, a formal instrument was executed between Chubbuck and Holland, of the one part, and King and Johnson, of the other, in which (the latter

assuming to deal as owners with the Johnson, Willats, & Co. property) the parties agree that a company shall be formed with a capital stock of 500 shares of \$100 each, of which, upon incorporation, Chubbuck and Holland shall receive 250 shares in payment of their properties to be turned in to the company, and King and Johnson sr., 150 shares, in payment for the property of Willats, Johnson & Co., which they, treating it as their own, likewise undertake to turn in. This agreement was executed by C. E. D. Chubbuck, K. B. Holland, J. S. King, and C. A. Johnson sr. Why J. S. King and C. A. Johnson sr.—instead of Johnson, Willats, & Co.—became parties to this instrument, is not very clear, unless it was because of the understanding that they should ultimately become the holders of Johnson, Willats, & Co.'s interest in the new company. In his evidence before the Master, Charles A. Johnson sr. says, at one time, that he and King were acting as agents for Johnson, Willats, & Co., and, at another, that Johnson, Willats, & Co., in the incorporation, represented himself and King. The Master, in giving reasons for placing J. S. King and C. A. Johnson sr. on the list of contributories, states that H. M. Johnson, C. A. Johnson jr., and one Kennedy (a book-keeper with Johnson, Willats, & Co.) “in signing the memorandum for incorporation for 150 shares, as subscribers, and in procuring the issue to themselves of stock certificates pursuant to their subscriptions, acted merely as the nominees or agents of the proposed contributories” (King and Johnson sr.) J. S. King and C. A. Johnson sr. were not petitioners for the incorporation of the Wakefield Mica Company, Limited; they did not sign the memorandum of agreement for incorporation; nor are they named, as incorporators or shareholders, in the letters patent, which bear date 22nd June, 1903. The 150 shares, in respect of which it is now sought to make them contributories, were subscribed for by H. M. Kennedy (one share), H. M. Johnson (one share), and C. A. Johnson jr. (148 shares).

The minute book shews that the Wakefield Mica Company was never validly organized. The provisional directors' meeting, the only shareholders' meeting and the only directors' meeting recorded, appear to have been held on 13th June, 1903. At this time there was no company in existence. Moreover, it was stated at the bar, and not disputed, that all these meetings were held in the Province of Quebec. No other meeting of directors or shareholders was ever held. It follows that all subsequent proceedings, taken upon the assumption that the company had been validly organized on

13th June, 1903, are absolutely void. There was no president, no secretary, no permanent board of directors; the issue of stock certificates and their subsequent transfers, through supposed officers of the company, to Messrs. King, Johnson sr., and others, were all alike unauthorized—and mere nullities. The Wakefield Mica Company, Limited, stands to-day with its provisional directors still in office and the original subscribers to the memorandum of agreement of the company, the petitioners for incorporation, Messrs. C. E. D. Chubbuck, K. B. Holland, H. M. Johnson, T. R. Kennedy, and C. A. Johnson jr., as its only shareholders.

Whatever may have been the relation borne by Messrs. H. M. Johnson, T. R. Kennedy, and C. A. Johnson jr. to Messrs. J. S. King and C. A. Johnson sr., whatever may have been the understanding between them in regard to the shares to be subscribed for and acquired by the three former gentlemen, though they may be trustees for and mere nominees of King and Johnson sr., they, and they alone, are holders of the 150 shares in question: Re London Speaker Co., 16 A. R. 508-517; Re Haggert Bros. Co., 19 A. R. 582. Section 10, sub-sec. 4, of the Ontario Companies Act provides that "each petitioner (for incorporation) shall be the bona fide holder in his own right of the share or shares for which he has subscribed in the memorandum of agreement." It may be that Messrs. H. M. Johnson, Kennedy, and C. A. Johnson jr. were obliged to hold their stock subject to the order and disposition of Messrs. J. S. King and C. A. Johnson sr.; it may be that upon the agreement of 30th May, 1903, Messrs. Chubbuck and Holland have some rights against J. S. King and C. A. Johnson sr.; the Wakefield Mica Company, Limited, had no rights whatever against them which its liquidator can ask the Court to enforce. They are not and never have been shareholders, and are therefore not liable to be placed on the list of contributories. Their appeal must be allowed.

It follows that the appeal of the liquidator as to the set-off allowed in favour of Messrs. J. S. King and C. A. Johnson sr., of \$2,515.14, must succeed. I find it difficult to understand how the Master, treating these gentlemen as contributories in respect of unpaid stock, allowed them a set-off for the value of property transferred to the company, not by them, but by Johnson, Willats, & Co. Their only claim that this property should be deemed to have been taken by the company in payment or on account of liability for stock, seems to have rested on the agreement of 30th May, which, because made before the incorporation, the Master held not

binding on and incapable of confirmation by the company. As creditors they would have no right of set-off. The liquidator will have the leave to appeal, therefore, which he seeks, and this appeal will be allowed.

Messrs. Chubbuck and Holland signed the memorandum of incorporation—C. E. Chubbuck for \$23,000 and K. B. Holland for \$2,000—and they are named in the letters patent as incorporators. The letters patent state “the acquisition of the business now being carried on by the said Charles Edwin Dixon Chubbuck and the said Kenneth Blackmore Holland under the firm name of the Wakefield Mica Company,” to be an object of the incorporation. The evidence clearly establishes that by notarial instrument, dated 13th October, 1903, C. E. D. Chubbuck transferred to the company, in consideration of \$25,000, the mica property in which he and Mr. Holland were interested. That this property was conveyed by Mr. Chubbuck in payment for the shares for which he and Mr. Holland had subscribed, and was so accepted by the company’s pseudo directors, is abundantly clear.

The company would never have acquired it unless taken in payment for the 250 shares in question. The liquidator has, with the sanction of the Court, sold it in the course of these proceedings. It would be most inequitable under such circumstances to deny to the vendors the benefit of what undoubtedly was the real consideration for their transfer to the company. Rescission of this transfer is now out of the question: *Re Hess Manufacturing Co.*, 23 S. C. R. 644, 665. The very charter of the company provides for the acquisition of the property transferred. In such circumstances, I should regret to find myself, by stress of authority, obliged to become instrumental in imposing upon Messrs. Chubbuck and Holland a liability to which the learned Master has declared them not subject. Having found no authority precluding my so doing, I shall dismiss this appeal.

In view of the result of these appeals and the apparent uncertainty and confusion as to the rights and positions of their respective clients which prevailed amongst the solicitors for the several parties in the Master’s office, the interests of justice will probably be best served by an order that there shall be no costs of the proceedings taken in the Master’s office to place Messrs. J. S. King, C. A. Johnson, sr., C. E. D. Chubbuck, and K. B. Holland, upon the list of contributors, or of these appeals.

FALCONBRIDGE, C.J.

DECEMBER 30TH, 1904.

TRIAL.

LANE v. GEORGE.

Easement—Right of Way—Reconveyance—Indemnity—Party Wall—Prescription—Chimney.

Action to set aside a conveyance of a right of way made by plaintiff to defendants in exchange for another right of way, and for a declaration and injunction in respect of an easement claimed by defendants.

J. Shilton, for plaintiff.

G. H. Watson, K.C., and T. A. Gibson, for defendants.

FALCONBRIDGE, C.J.—The only question as to the right of way was whether plaintiff had the right to demand a certain covenant of indemnity in the reconveyance. It seems to me that all she was reasonably entitled to was the rescission of the agreement which she complained of, and relegation to her original position.

It now appears that the right of way actually used by plaintiff and her predecessors for nearly 30 years, with the assent of defendants and their predecessors, is not the same as the right of way as originally described and as described in the conveyance by plaintiff to defendant and in the draft reconveyance. Plaintiff says she wants the right of way as it was when she bought the property. Defendants have no objection to a declaration substituting the right of way as used for that originally described. This plaintiff may have if she choose; but, subject to this, her action on this branch fails.

The second branch of the case is as to the chimney. According to the evidence of William Prowse, the kitchens and sheds were built in the spring of 1874, and the houses 3 or 4 years later; the party wall is as originally constructed, and there always was a hole in it from the south kitchen; there was continuous user of the hole from the south house up to 1886. Sykes proves that the hole existed when he bought the south house in 1887, and right along; he purchased the north house in July, 1889, and owned both until April, 1892.

The law applicable to such a state of facts appears to have been particularly defined in the United States, and it is summarized in the Am. & Eng. Encyc. of Law, 2nd ed., vol. 22, p. 247: "The use of a party wall to maintain chimney flues is a lawful use, especially where such is the customary method of construction. Both parties are entitled

to use the flue when it is built in the middle of the wall, though the lower part of it is wholly in that part of the wall, which is on the land of one owner." See *Fidelity Lodge v. Bond*, 147 Ind. 437; *Ingals v. Plamondon*, 75 Ill. 118; *Weill v. Baker*, 39 L. R. A. 1102. . . .

Action dismissed with costs.

DECEMBER 30TH, 1904.

DIVISIONAL COURT.

BEEMER v. BEEMER.

Malicious Prosecution—Proof of Favourable Termination of Prosecution—Informal Abandonment—Reasonable and Probable Cause—Findings of Jury—Costs.

Appeal by defendants from judgment of MEREDITH, C.J., in favour of plaintiff, upon the findings of a jury, for \$1 damages in an action for malicious prosecution. The plaintiff was a married woman, the defendant Lydia Beemer was plaintiff's mother-in-law, and defendant Hannah Beemer, her sister-in-law. The defendant Hannah laid an information before the police magistrate for the town of Woodstock charging plaintiff with setting fire to the house of defendant Lydia Beemer, and plaintiff was arrested and admitted to bail. The information was not further proceeded upon, but there was no formal dismissal of the charge.

The appeal was heard by BOYD, C., MEREDITH, J., MAGEE, J.

C. J. Holman, K.C., for defendants.

L. F. Heyd, K.C., for plaintiff.

BOYD, C.—Information laid by Hannah Beemer against plaintiff for unlawfully setting fire to dwelling-house on 18th September, 1902, and warrant of same date to arrest issued. Under this plaintiff was arrested and brought before the police magistrate (since dead), and was let out on bail. That was on Saturday, and she says she was to return on Monday before the magistrate, but did not do so, and heard no more of the matter.

Tisdale, the high constable of Oxford, who arrested plaintiff, says the case did not come on for trial, but he does not know why. He served 11 summonses for the Crown preparatory to the hearing. Being asked if the information was withdrawn, the question is objected to and is not an-

swered by him. His fees were paid by Mr. Ball, and the money apparently came from one of the defendants.

Zeats, chief constable at Woodstock, handed the police magistrate's warrant to Tisdale to be executed in the country; he says the bail was granted on Saturday, and the subpoenas to witnesses were set for the following Tuesday. He says the hearing did not come on upon Tuesday, and he says he thinks he got instructions from the police magistrate—but being interrupted does not complete his answer, which had reference to withdrawal of the proceedings.

Mr. Ball, of counsel for the defendants, says with reference to the payment of the fees by the defendant Lydia Beemer: "She simply came and paid the money to withdraw the proceedings. Surely that would not bind her for what took place previously."

When a nonsuit was moved because it was not proved that the prosecution had terminated, the Chief Justice said: "It is not a court at all before the police magistrate; it is a preliminary inquiry. . . . Must I not take notice of the fact that there could not have been an enlargement of the 8 days, and that the prosecution must have come to an end in that way? There was here no enlargement after the Tuesday." He thinks that there is evidence because it did not go on then, and concludes that he will reserve the question and not dispose of it then.

Defendant Lydia Beemer in cross-examination says "she paid money to Mr. Ball for Tisdale, but as for settling it she did not settle it because she had nothing to do with it" (i.e., laying the information). She is asked, "How did the proceedings come to be withdrawn?" A. "I told you I went up a while after and Mr. Ball told me I had better pay Mr. Tisdale's expenses, and I said I did not have anything to do with it, although if he thought it right I would." Upon re-examination she is asked by her own counsel: "Why did you go and pay the costs and withdraw the proceedings?" A. "I cannot mind that."

The other defendant is asked: "Why did you not go to Court and prosecute?" A. "I did not have to go to Court." Q. "Well, how was it stopped?" A. "I do not know how it was stopped." Q. "Tell me, what stopped the proceedings?" A. "Mr. Zeats ought to know better than I do."

The Chief Justice treats it in charging the jury as proved that the defendant Lydia Beemer paid the costs of the prosecution, and at Mr. Ball's request, and says also that "the

prosecution did not go on apparently, and he puts the hypothesis that defendants were advised by Mr. Ball that it would not be wise to go on with the prosecution and to pay the costs at this stage in order "that the prosecution might be put an end to. . . . The parties have not told what became of the prosecution, and therefore you have to get from the facts as well as you can how that was." . . .

It is said that a prosecution may be regarded as terminated when it has been disposed of in such a manner that it cannot be revived, so that the prosecutor, if he intends to proceed further, must institute proceedings *de novo*: *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 19, p. 681.

In this case I think the evidence suffices to shew—and is eked out by the questions of counsel for defendants—that the summons was not prosecuted by defendants before the magistrate, but that the costs were paid and the matter was allowed to drop. No written termination of the proceedings is needed in such a preliminary investigation, and the death of the magistrate precluded his being called. Enough was shewn here, under the authority of *Reid v. Maybee*, 31 C. P. 392, to justify the jury and the Court in assuming that the prosecution had terminated favourably to the accused before the action was brought on 9th January, 1903: see *Criminal Code*, secs. 567, 580, 586; *Stevens on Indictments*, p. 73.

In other respects upon the points argued I agree with the conclusion of my brother Meredith that the case could not properly have been withdrawn from the jury, and their finding should not be set aside. Finding that there is proof of a favourable termination of the prosecution, as alleged, I think that altogether the judgment should be affirmed with costs.

These costs, I think, should be on the lower scale and no set-off.

MAGEE, J., gave reasons in writing for the same conclusion.

MEREDITH, J.—"The trial Judge could not rightly have withdrawn from the jury the question whether defendants really believed plaintiff to have been guilty of the crime with which she was charged, the whole course of unfortunate antagonism and quarrelling between the parties, left that to some extent an open question; and so the jury were very properly told that it was for them to find whether the charge was made in good faith, and that if they found that it was,

then they must find for defendants, for in that case there would be reasonable and probable cause.

There was also some evidence, which could not be dealt with except by the jury, from which it might be found that the elder defendant had joined with the younger in the prosecution, in not only the testimony of the witness Zeats and the admission of counsel for defendants, but also in the antagonistic attitude and conduct of the parties, the one towards the other, the defendants together on the one side, and plaintiff and her husband on the other. . . .

But I am unable to find any reasonable evidence of the determination of the criminal prosecution in plaintiff's favour. . . .

I would allow the motion and dismiss the action, on this ground, with costs.

DECEMBER 30TH, 1904.

DIVISIONAL COURT.

VALIQUETTE v. FRASER.

Negligence—Injury to Person—Falling of Wall of Building—Exceptional Storm—Defective Construction—Knowledge of Owner—Employment of Competent Superintendent and Builder.

Appeal by plaintiff from judgment of TEETZEL, J., ante 60, dismissing the action.

Action under the Fatal Injuries Act by the widow and administratrix of one J. S. Valiquette, a boiler maker, who, while working for a contractor at a mill in course of erection for defendants, was killed by the falling of a wall of the building in which he was working. The accident took place in the Province of Quebec. It was admitted by counsel at the trial that the law of that Province was to be treated as identical with that of Ontario so far as the rights of the parties were concerned, except that there was no Employers' Liability Act in Quebec. The law to be applied was, therefore, the law of Ontario without the Workmen's Compensation Act.

The fall of the wall was caused by a severe storm of wind on 7th August, 1903. The action was brought against the

Fraser, who were the owners of the building, and against one Garrock, the contractor for the brick work.

J. Lorn McDougall, Ottawa, for plaintiff.

A. B. Aylesworth, K.C., for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., -BRITTON, J.), was delivered by

STREET, J.—. . . A very careful perusal of the evidence has led me to the conclusion that the collapse of the building was probably caused by the fact that the storm came upon it in its unfinished state. The wind—a very violent one—rushed into the building through the openings left for doors, and lifted the roof; and the wall, having no support at the top, was forced over by the pressure of the wind. The evidence of Proper (the superintendent of the building work) gives reasons for not having doors fitted at the openings; the openings were being used for bringing in large pieces of machinery in connection with the construction of the boiler. I think his explanation affords a sufficient reason for not having these openings closed by doors at the time; and I do not think that it was incumbent upon him to incur the inconvenience of temporarily closing them with planks, because it was within the possibilities that such a storm might overtake them. The question is, whether it was his duty, as a reasonably prudent man, to have kept these openings blocked up with planks, at all times when they were not in actual use by the construction boiler makers at work there, lest an unusually severe storm should suddenly obtain entrance and force off a roof weighing 18 tons. I think plaintiff has failed to shew any actionable negligence on the part of defendants in this or in any other respect: *Pearson v. Cox*, 2 C. P. D. 369.

The highest ground upon which plaintiff can put the liability of defendants Fraser & Co is that deceased was lawfully upon premises owned and occupied by them, and that they owed a duty to him to see that due care had been exercised in the construction and maintenance of the building in which he was lawfully at work: *Indermaur v. Dames*, L. R. 2 C. P. 311; *Marney v. Scott*, [1899] 1 Q. B. 986.

Defendants Fraser & Co. were not insurers of the safety of the workmen employed at the building, nor bound by an implied guarantee to them that it was absolutely safe. Guarantees which are implied are not to be extended beyond those

implications which are reasonable in the circumstances. It would be an unreasonable implication that a land owner putting up a building upon his land, who has let the contract for it, according to a plan prepared by a reputable and experienced architect, to a reputable and experienced contractor, is bound to acquire the technical knowledge necessary to enable him to pronounce upon and approve or reject the plans of the architect and the work of the contractor, upon pain of being held guilty of negligence. It would be unreasonable because it is entirely contrary to the established usage and practice for an owner to attempt to acquire the complete professional knowledge of the principles of architecture and construction which would be necessary to enable him to deal with the subject, before he could venture to put up a building for his own use. The universal practice is for the owner to employ persons whose professional training is supposed to fit them for the purpose; and when due care has been taken in the selection of persons to draw or approve of proper plans and to do the work without interference or stint, the duty of the owner in general has been performed, unless special circumstances, not appearing here, impose upon him higher obligations: *Black v. Ontario Wheel Co.*, 19 O. R. 578; *Searle v. Laverick*, L. R. 9 Q. B. 122. Cf. *Francis v. Cockrell*, L. R. 5 Q. B. 501, 508.

Even, therefore, upon the assumption that the construction of the walks did not afford the margin of safety required by the rules upon which such buildings should be erected, or that the manner in which the roof was attached to the walls might have been improved upon, those were matters upon which experienced architects and practical builders are not in accord, and the owner cannot, consistently with the principles upon which liability is founded, be held answerable. They are matters of strictly technical knowledge, and he is obliged to rely upon persons whose business it is to possess it. If the alleged defect were one not requiring that knowledge, but patent to any ordinary person, such as an open trap door, or an unfenced opening in his building, different considerations would be properly applied. This is, in effect, the rule laid down in *Indermaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 311, viz., that a person lawfully on the premises on business, and not as a mere licensee, is entitled to expect that the occupier shall use reasonable care to prevent damage from unusual danger which he knows or ought to know.

I find nothing in the cases decided since *Indermaur v. Dames* extending the rule there laid down, although the

language used in some of them must be limited by the facts with regard to which it is used. The cases are well grouped, and a comparison is invited by the grouping, in vol. 19 of *Ruling Cases*, pp. 4 et seq. and 60 et seq. The rule in *Indermaur v. Dames* is, of course, not applicable to all circumstances, and the liability of an owner or occupier may be much extended, where, for instance, a duty to the public, statutory or otherwise, is involved, as in *Tarry v. Ashton*, 1 Q. B. D. 314, and *Button v. Great Western R. W. Co.*, L. R. 7 Ex. 130, or where, for a valuable consideration, something is supplied by defendant to be used by plaintiff for a particular purpose, as was the case in *Francis v. Cockrell*, L. R. 5 Q. B. 501—see p. 508, where the rule is formulated.

Appeal dismissed with costs.

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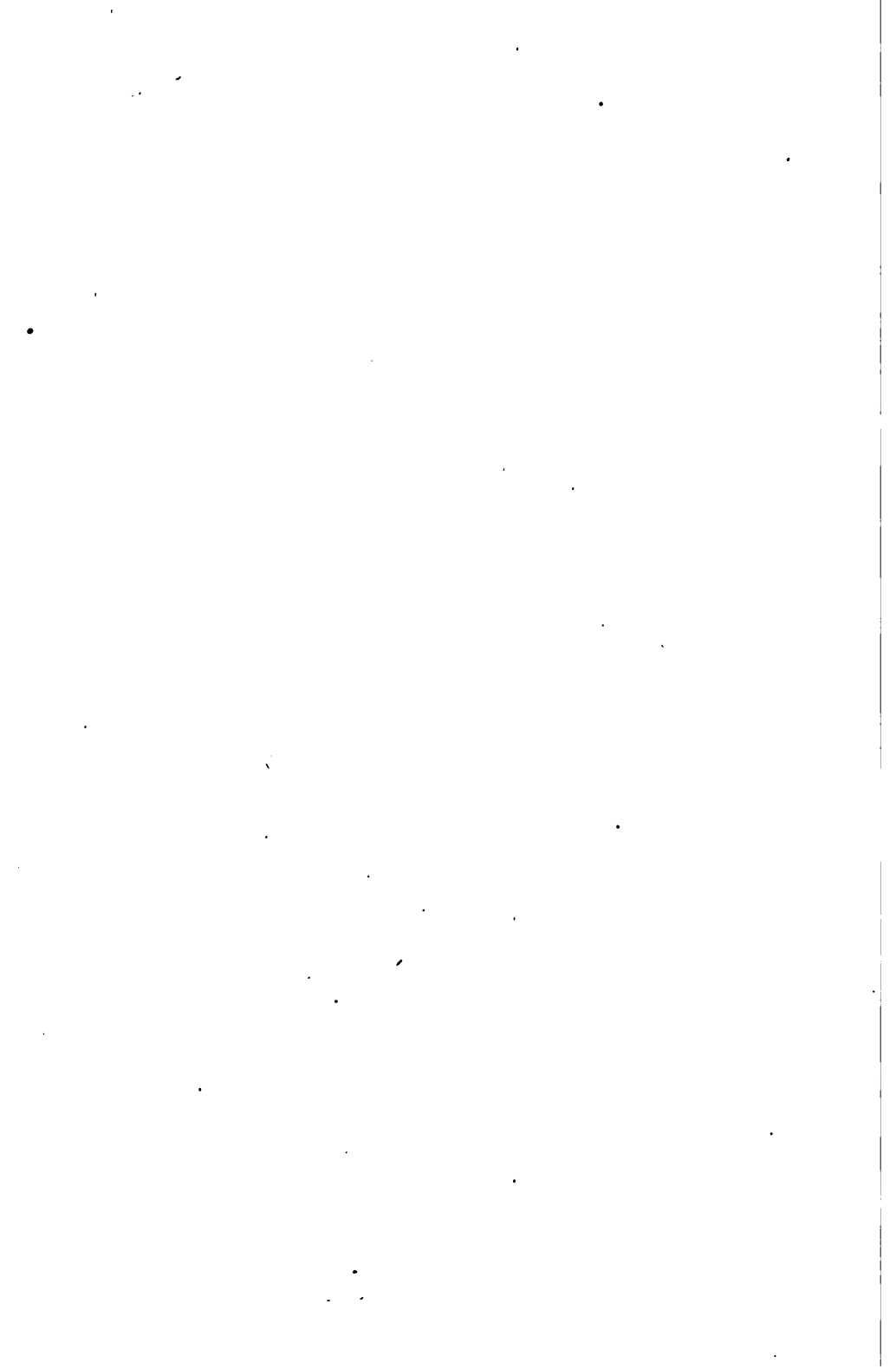
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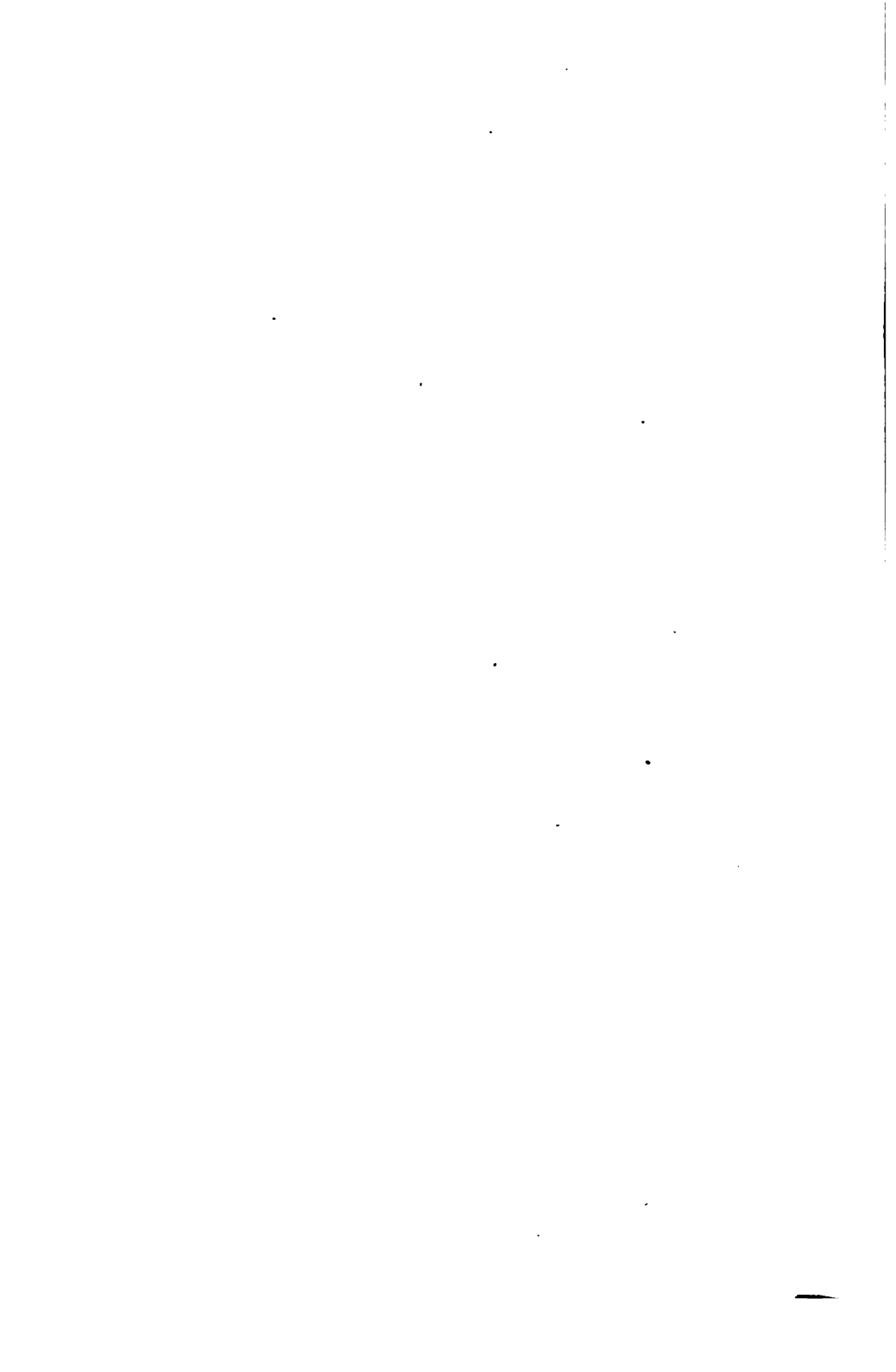
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